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> *“Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῇ καὶ τὸ χρήσιμον.”*—Arist. *Pol.* II. 1.

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THE FRANCO-ITALIAN DRAFT CODE OF OBLIGATIONS, 1927.

[*Contributed by* S. G. VESEY-FITZGERALD, ESQ.]

The Genesis and Prospects of the Draft.—This Draft Code of Obligations is the offspring of one of the most honourable enthusiasms of the World War. The brotherhood of two great Latin nations was, as the learned authors say, cemented afresh on the field of battle; but, not content with comradeship-in-arms, they looked beyond the hatreds of the moment to the ultimate ideal of universal brotherhood, to a time when the nations of the world should be united in allegiance to a common system of law. It was as a first step toward that ultimate ideal that a committee of exceptional distinction in each country was set to the task of unifying French and Italian law, and took as the most promising field for a first joint effort the law of obligations and contracts. The Italian committee acquired during the course of its deliberations the status of a Royal Commission; the French committee received the recognition of the Ministry of Justice. Their joint report was submitted to their respective governments in October 1927. Nothing further has been done, nor does there appear to be any immediate prospect of action.

This is, perhaps, an overstatement. The draft Code has, we believe, been passed into law in the Kingdom of Albania. It has attracted among scholars the attention which its great interest deserves, and has been brought to the notice of other Latin and Mediterranean nations, some of which, notably Rumania, are understood to be favourably considering the possibility of enacting it into law. But though it has been four years before the world, there is (at least so far as we can discover) no immediate prospect of its becoming the law of either France or Italy.

For this state of affairs there are several reasons. The promulgation of Codes, the idealist improvement of law, is a hobby of benevolent despots, not of democracies. Provided the existing law can be made to work without widespread injustice, a representative assembly is not likely to be stirred to enthusiasm over merely theoretical improvement ; and in France at least, a large section of professional opinion and the overwhelming majority of lay opinion are opposed to any drastic alteration of the *Code Napoléon*, which has become the Ark of the Covenant of French civilization. Among university lawyers emphatic form was given to this sentiment as long ago as 1904 by M. Planiol.[1] For the practising lawyer a new Code is always a clumsy weapon, *un outil incommode*, until he becomes accustomed to it[2] : and for what purpose all this disturbance ? *On ne la ferait pas*, says M. Planiol, *uniquement pour retoucher des points de détail, pour modifier quelques textes mal redigés, pour compléter ceux qui sont insuffisants ou pour supprimer les parties mortes qui sont devenues encombrantes ; si on entendait se borner à ces retouches de pure forme ce serait entreprendre une bien grosse affaire pour un mince profit. On voudrait introduire dans le Code certain conceptions récentes. En cela justement est le danger.* The sentiment is as old as Aristotle, who bases it on the higher ground that too frequent changes of the law weaken its claims to obedience.

In Italy under the Fascist regime a procedure exists (Law of December 30, 1923, No. 2814, Art. 2) by which the drafts of the Commission for the reform of the Civil Code do not have to run the gauntlet of a popular assembly but may be passed into law by special Parliamentary commissions. Probably, also, it would be correct to say that the existing Italian Codes have not captured the popular imagination as the *Code Napoléon* has captured that of France. The tradition of the *risorgimento* is enshrined in great personalities rather than in a system. Accordingly, there is not the same weight of sentiment against putting the law into the melting-pot in order to secure greater perfection of form. Yet even in Italy the Franco-Italian draft appears to have been put on one side, while other work of the Royal Commission is given precedence.

Indeed, what useful purpose is served by a uniform Code of Obligations or any other branch of law between two countries which have separate legislative and judicial systems and entirely different political and economic problems ? That their legal ideas should be the same, so that the citizens of the one may be on familiar ground when they come in contact with the laws of the other, so much is highly desirable. But that degree of unity France and Italy already have, and have had at least since 1865, when the *Codice Civile* came into force. Statutory uniformity, that the written law of the two countries on any topic should be word for word the same, would not be an advantage unless one could be sure that it applied to every detail: and that degree of uniformity has not been achieved by the present draft. The differences are few, but they are vital: note as to the legal capacity of married women (Arts. 12 and 13) and the liability of the State for the acts of its employees (Art. 79). The closer a statutory uniformity may be, the more likelihood that wrong advice will be given and damage caused by such differences being overlooked.

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[1] *Le Code Civil, Livre du Centenaire*, 1904, vol. ii, 955–63. The opposite point of view was urged in the same volume by Prof. Larnaude.

[2] One cannot fail to recall the inconvenience caused to lawyers in India by the recasting in a new form of the Code of Civil Procedure in 1908. That that code was an improvement on its predecessor few would now deny. But might not the improvements have been made as M. Planiol suggests in the French case *par voie de réformes partielles* ?

The course of legal history in Europe from the barbarian invasions onwards has been on the whole in favour of the unification of law. Village, tribal and folk customs die out or become merged in the law of a single large state. That was the history of England at an early date, of France through long centuries, of Germany and Italy in modern times. To this result two causes have contributed, the creation in each of the countries concerned of a strong central sovereign authority and the improvement of communications. The latter has advanced by giant's strides since the close of the Napoleonic wars, and is still advancing. It has brought in its train the ever-growing importance of the conflict of laws; and it is at least an arguable proposition that the future will see ever larger and larger territories subjected to single systems till at last the whole world finds it intolerable to have more than one system of law. Natural law will be exemplified in an enacted Code; and the millennium will definitely have arrived.

This process of legal development, however—if indeed it is this that the future holds in store—cannot be pursued as an end in itself. Unification of law—as distinguished from unity of legal theory which, as we have said, France and Italy already have—can only be attained and preserved in one of three ways. First, the law of two countries may become and continue the same at the cost of falling further and further out of touch with the changing social, economic and political needs of their peoples. In that case, as has sometimes happened in Islamic countries, a nominal allegiance to an unchanging system would disguise a real adherence to customary law. Secondly, the civilization of the countries concerned may guard against divergence by encasing itself in the armour of a Chinese rigidity, a condition which can only be desirable when there is no further use for the idea of progress on earth. In the third alternative, the countries concerned must be prepared to submit not only to a single system of law but to a single sovereign legislature capable of adjusting the law to their changing needs. The United States of Europe might have such a law : without some such body it is but a will o' the wisp. The history of the Latin Currency Union is hardly an encouraging precedent.

Nevertheless the draft Code before us, even if it never passes into law, will have a lasting interest and value. The comparison of different systems of law always leads to a greater and more accurate knowledge of one's own system, and nobody who may desire to know the French or Italian law of obligations can afford to neglect this statement by some of the keenest legal minds in both countries of what that law in 1927 ought to have been. Moreover, under the continental system the *doctrine* of the schools very largely influences the *jurisprudence* of the courts ; and, as a statement of *doctrine*, the draft must play a large and healthy part in influencing the development of the law for many years to come.

The Legal " Straits of Dover."—Scotland and those British dominions which acknowledge the Roman-Dutch law are not altogether exempt from the influence of Anglo-Saxon jurisprudence, any more than that jurisprudence is free from the influence of Rome. Apart from them, there is not a single Roman law country or people in either hemisphere [1] which has not codified its law since 1804 under the influence in greater or less degree of the Code Napoléon. The Code marks a definite new starting-point for the law and legal theory of continental Europe ; so that even in France to-day a reference to Pothier or Domat, still more a reference to Justinian, has in court almost as academic a flavour as it has among ourselves. Oriental countries also—Turkey, Egypt, Japan, China —seeking to refashion their law on a western model have borrowed from the *Code Napoléon* either directly or through some other code founded upon it. The result has been not merely to deepen and widen but to transform the character of the gulf which separates the Anglo-Saxon legal system from the rest of the civilized world.

To the at present impassable character of this gulf the draft before us and the report of the drafting committees bear striking witness. In their endeavour after perfection the learned and distinguished draftsmen have drawn upon a very large number of different legislations: they have borrowed, among others, from the Codes of Germany, Austria, Switzerland, Spain and Brazil. Yet there is not a single rule derived from English law in the whole draft. Why is this? Did not the eponymous hero and galvanic force of the French Code describe us justly enough as a nation of shopkeepers? and may not shopkeepers be presumed to know something, at any rate, about the proper working of a doctrine of contracts?

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[1] Even French Canada. The instruction of the Canadian legislature to its draftsmen in 1866 was to take the Code Napoléon for a model whereon to draw up a code embodying the existing law of Canada. Reforms were to be matter of separate, even though concurrent, proposals.

The answer is not, as is commonly supposed, in the formless character of our law and the repellent aspect which it presents to those who may wish to study it. It is an object of study on the Continent, and M. Lévy-Ullmann in particular was amply qualified to advise his colleagues on the French committee concerning our doctrines: while the readiness of the Italians to consider them is evidenced by the work of Sarfatti and the action of the learned editor of the *Annuario di Diritto Comparato* in inviting English criticism[1] of the draft. The ultimate vision before the authors of the Code was all-embracing; the immediate prospect was the workaday necessity of proceeding step by step; and of the difficulty, almost impossibility, of transferring single rules from our tradition to theirs very striking instances may be given.

Thus, English critics of the draft have objected to Art. 2, cl. 1,[2] in words borrowed from *Adams* v. *Lindsell*.[3] "If that were so, no contract could ever be completed by post." But to have introduced the somewhat more complicated English rule would have involved introducing the English distinction between an offer and an invitation for offers, such as an advertisement or a catalogue. A similar distinction exists in French law: the notice "*Appartement à louer*" does not oblige a landlord to take as lodger the first person who offers to pay the rent. But the distinction is different from ours; "*les négociants qui annoncent dans des circulaires, prospectus, affiches, . . . les prix et conditions de leur négoce sont dans un état permanent d'offres à l'égard du public, tant qu'ils ne les ont pas retirées.*"[1] Obviously, a shopkeeper could not be held responsible for fulfilling orders which he never received. It is always difficult to foresee what consequential amendments the introduction of a new principle will involve, and to have borrowed from English law would have meant transplanting not only principles but vocabulary: the definitions even of identical terms being susceptible of infinitesimal but vital differences of meaning.

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[1] Three comparisons of the draft with English law from the pens of distinguished English jurists have appeared in vol. iv–v, pt. 1 of the *Annuario*: namely, by Professor Lee on the general doctrine (pp. 120–38), by Professor Gutteridge on the outline of contract (pp. 155–67) and by Professor Winfield on the outline of delict (pp. 259–70). The present writer desires to express his obligations to them. He would not have undertaken his task, had he known that three such authoritative pronouncements were already in the Press. But, inasmuch as his object is different from theirs, he has not felt justified in abandoning it altogether.

[2] *Le contrat se forme aussitot que l'auteur de l'offre a eu connaissance de l'acceptation de l'autre partie.* See Lee, *op. cit.*, p. 123; Gutteridge, *op. cit.*, p. 158.

[3] 1 B. and Ald. 681.

In effect, moreover, the English law is nearer to the Franco-Italian than at first sight appears. "*Pour qu'il y ait consentiment et par suite contrat il ne suffit pas que les volontés coexistent; il faut encore qu'elles concourent*" (B: L., *loc. cit.*). "An acceptance of an offer made ought to be notified to the person who made the offer, in order that the two minds may come together. Unless this is so the two minds may be apart" (Bowen L.J. in *Carlill* v. *Carbolic Smoke Ball,* [1893] 1 Q.B. 269). English law assimilates an acceptance by post in cases where the acceptor has express or implied authority to use that means of communication to an acceptance by commencing performance. The latter is expressly provided for in a manner parallel to English law in Art. 3 of the Franco-Italian draft: it is by no means clear that French and Italian courts would not in a suitable case take a similar view of the former. For it is difficult to imagine a case in which substantial damage would be incurred by postal acceptance which was not also in some sense part performance. The communication, for instance, in *Household Fire Ins. Co.* v. *Grant,* 4 Ex.D. 216, was more than bare acceptance of a contract: it was part performance, for an allotment letter is a document of title of specific shares, although conditional and not final.

Similarly, an English lawyer will discover with considerable surprise that undue influence is not a specific *vice de consentiment entrainant l'annulabilité.* Nor does it come within the accepted definitions of *erreur, violence* or *dol,* the three recognized *vices.* Indeed (Art. 20) *La seule crainte révérencielle sans qu'il y ait eu de violence, ne suffit point pour faire annuler le contrat:* a rule stated in more sweeping form than in the existing *Code Civil.* The inadequacy of the existing law has been felt by the authors of the draft; and we who are proud of the elaborate rules which our law has built up to protect the weak against "the insidious forms of spiritual tyranny" might have expected our experience to be useful.[1] But no; even to fill an admitted *lacuna* borrowing from English law would not have been practical: it would have involved at least an uncertain quantity of new definitions and consequential amendments. Instead, by a bold innovation (Art. 22) the authors of the draft propose to introduce a far more sweeping rule. From the mere disproportion between the advantages drawn by the two parties, whoever they be, the judge may draw an inference that the consent of the worsted party *n'était pas suffisamment libre* and may proceed either to cancel or to rectify the contract. This goes, of course, a great deal farther than our law, for with us it has been repeatedly held that the mere inadequacy of the consideration is not by itself evidence of undue influence. The provision was taken from the Italian Code for the Colony of Erythræa, and was deliberately chosen rather than the more limited rule of the German Code, which approximates more nearly to our own. Some may say that it is more suitable to the patriarchal government of an Oriental dependency than to western civilization; that depends on the arguable question whether in the latter parties are normally capable of dealing with one another at arm's length.

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[1] *Arrêt du tribunal de commerce de la Seine,* 5 *Janvier* 1869, quoted by Baudry-Lacantinerie, § 797.

The scope of the new article will no doubt be limited, as time goes on, by interpretation. At present, so far at least as a foreigner may presume to judge, its terms are so wide that they appear to render most of Arts. 14 to 21 superfluous; for instance, the distinction between Art. 17 and Art. 21. By the former, violence by a stranger is sufficient ground for annulment, provided it was intended to secure the contract (*e.g.* a trade union forcing its nominee on an employer?); by the latter, deceit is only sufficient when it emanates from a party to the contract. But it will be possible under Art. 22 to annul or rectify a contract without proof of violence, deceit or even mistake.

Similarly Art. 25, which deals with specific performance of a preliminary contract and its enforcement by judicial execution of the contract envisaged, is a new article. The English *jurisprudence* on this subject is exceptionally rich. But it is rightly ignored by the learned authors since to have embarked upon it would have involved navigating the English Law of Real Property.

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[1] Gutteridge, *op. cit.*

Again Art. 27 cl. 2, Art. 49 (both of them new) and Art. 50 lay down the law on the thorny topic of colourable transactions and secret agreements that a contract shall not mean what it appears to say. So far as they go, they state with the utmost clearness what is in fact the English law on this thorny topic, as it has been elaborated in India where this particular form of dishonesty is rife. But there is no evidence that English experience was even considered. If it had been, the last clause of Art. 49 would have been qualified by some account of the burden of proof. And nobody with any knowledge of the shameful practices of *benami* and *farzi* in India could have committed himself (p. lxix of the report) to the confident statement that "*L'article* 49 *pose un principe qui ne pouvait soulever de grandes difficultés*"!

When we turn to the *Partie Spéciale* (Arts. 323–739) of the draft the same divergence appears. An Englishman asked to name the specific contracts of most frequent occurrence in the life of an ordinary citizen would certainly mention negotiable instruments, and might also mention contracts of insurance.[1] Neither of these finds place in the existing Civil Codes of France and Italy, nor in the draft, for the historical reason that they do not trace their descent from Roman law. Their proper place according to continental ideas is in a *Code de Commerce*; and of those specific contracts enumerated in the *partie spéciale*, hardly one is defined in the same way or capable of being subjected to the same rules as its English counterpart.

Most noticeable of all, perhaps, is the cleavage in regard to partnership. Our law of partnership is in theory a development of our law of agency; its keynote is action. The continental law starts from the principle of contribution (Art. 531); its keynote is community of interest by shares. Both principles, of course, agency and contribution, have to be considered by any system of law (see *e.g.* the quasi-agency in Art. 551 cl. 1); but the results of the difference in stress are notable. *Sociétés universelles* (Arts. 533–537) would ordinarily with us be regarded not as partnerships at all, but as forms of joint tenancy or tenancy in common; we should look for them not in the law of contracts but in the law of property. The same is true of many instances of *Sociétés particulières*, Art. 538. The *associés non administrateurs* would not in our law be partners (Partnership Act, 1890, § 2 and § 24 cl. 5). The very brief provisions regarding liability to third parties (Arts. 554, 555) appear also to differ widely from our more complicated provisions (Act § 9, also *Pollock on Partnership*, notes to § 9 and ch. 3, § 1), the reason for the difference being that the *associés* in the Franco-Italian law are not in any true sense agents one for another.

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[1] Some business done by insurance companies, *e.g.* annuities and guarantees, comes within the Draft Code, but not insurance strictly so called.

Some Deeper Differences of English and Continental Theory.—English readers are commonly amazed by the extreme brevity and summary character of the draft. In 739 articles it deals not only with the general theory and the whole law of contracts, delicts and similar causes of action, but also with a variety of miscellaneous matters which we should regard as falling within the province of civil procedure or evidence: see *e.g.* Arts. 300–322 on presumptions, acknowledgments and oaths. The law of delicts can apparently be stated in twelve articles (74–85), though in this case the appearance is probably deceptive. The difference is less noticeable when we compare the draft with portions of our own law which have been codified; Sale of Goods, for instance, or Partnership. Nevertheless the brevity of the draft Code as compared with the bulk of English law does not arise solely from the merits of codification, but from deeper causes.

(*a*) *Judicial Discretion.*—The first of these is the position of the judge. In spite of the immense prestige of the English judiciary, it is the constant endeavour of Parliament, and, indeed, of the judges themselves, to limit judicial discretion at any rate in all problems of substantive law. *Optima est lex quae minimum relinquit arbitrio judicis, optimus judex qui minimum sibi.* If there must be discretion at all, we are apt to say (as in the question of damages) we prefer the instincts of a jury to the cold reason of a judge. The causes of this lie deep in our history; a hide-bound system of precedent has been in the past the protection of upright-minded judges against the encroachments of the executive. But in France, although there was a time when the *Parlements* made use of a similar defence against the king, judicial discretion has been accepted by a tradition which dates back at least to Beaumanoir, for whom the *estimacion de loial juge*[1] was a supreme criterion. The sentiment in favour of judicial discretion finds its place even in the *Code Napoléon*[2] and receives emphatic approval and wide extension in many clauses of the present draft. We have already referred to Art. 22, which enables a judge not merely to tear up a contract, but if necessary even to re-write it according to his own notions of fair dealing between the parties. It may be arguable how far Art. 25 really gives the judge a discretion ; and Arts. 76, 77, cl. 2, 85, are at first sight not much wider than an English jury's discretion as to damages. But they do apparently leave it open to the judge to say that on grounds quite independent of the wrong suffered, there shall be no compensation at all. Art. 86, another new article whose sweeping terms leave the English lawyer breathless, covers the whole ground of discovery of documents and a good deal more beside, appears to allow inquisitive persons to insist on seeing their neighbours' title-deeds in order to find out whether they have a good cause of action, and places no limits to this except the probably sufficient ones of judicial good sense and caution. In the title on sale, Art. 368 has had a new cl. 2 added to it, enlarging judicial discretion by permitting the judge on a suit for resiliation to maintain the contract and reduce the price. In Partnership, again, Art. 561 leaves the question of compulsory dissolution, even of those partnerships which being for a fixed period are normally indissoluble, entirely to judicial discretion. This is not a new article, but the second clause of it (which enables a judge to expel a single partner from a continuing partnership) is new : and, moreover, that the intention, even as regards the first clause, is to enlarge judicial discretion may, perhaps, be inferred from the fact that the specific instances given in the existing French and Italian codes are omitted.

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[1] *E.g.* Salmon's edn. Art. 1972.

[2] This is possible, of course, because no judicial decision is legally binding. Baudry-Lacantinerie (§ 852), for example, can argue without a single decision to support him that marriage brokage contracts not merely ought to be but are valid in spite of three reported judicial decisions to the contrary. The desire to fetter judicial discretion is one of the chief causes of our own theory of judicial precedent.

(*b*) *Vocabulary*.—Judicial discretion, of course, is never, even in France, as free as it appears to be. It is fettered by tradition, by the *doctrine* of the universities and the *jurisprudence* of the courts. Accordingly the Code assumes a large measure of legal knowledge on the part of its readers : no attempt is made to define its principal conceptions. *Dol* (*dolus*) *faute* (*culpa*), *violence* (*vis major*), *en bon père de famille* (*tanquam bonus paterfamilias*), *comme en ses propres affaires* (*tanquam in rebus suis*) : these and numerous other phrases are too familiar to the lawyers of the countries concerned to need explanation. To us also, of course, they are familiar, but we should make a grave mistake if we should suppose that their meaning has remained unaltered for fourteen hundred years or should attempt to read them in the light of our own " *minces* *bagages de connaissance en droit Romain acquises à l'école."*[1] The three most interesting of such omissions to define are *obligation, cause* (*causa*) and *faute* (*culpa ?*), of which the first indirectly and the two latter directly involve the consideration of a mental state. All three have shifted their meaning since Justinian's day.

(*c*) *Obligatio.*—The draft Code is described on its title-page as a code of obligations *and* contracts. But the first article is a definition of contract; and from beginning to end there is no attempt at a definition of obligation. So far as the general content of the work is concerned, it is almost though not quite correct to say that any cause of action is an obligation in the modern law which is based on the law of obligations in Justinian. True, the relations of *tutor* and *pupillus*, of *heres* and legatee have disappeared from the list (*cf.* Inst. 3.27): on the other hand, *aveu* and *serment* (Arts. 310 to 322) only find their present place because in the Digest *De jure jurando* and *De in litem jurando* are sandwiched into Book XII, the rest of which deals with the question of *causa* in contract and quasi-contract.

As everybody knows, Justinian's definition of *obligatio* was supremely illogical: *juris vinculum quo necessitate adstringimur alicuius solvendae rei*; and the ensuing classification, which with slight verbal differences is as old as Gaius, merely exemplifies its absurdity: *ex contractu, quasi ex contractu, ex maleficio, quasi ex maleficio.* How can we speak of a duty as arising merely from the breach of a duty? The *necessitas solvendae* after the delict is remedial, not original; delict is on a par not with contract but with breach of contract.

Modern civilians accordingly have preferred the definition of Paulus (D. 44.7.3): *Obligationum substantia . . . in eo consistit . . . ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum*; in the accepted French phrase *donner, faire, ou ne pas faire.* Accordingly the *Code Napoléon* rightly classifies obligations as contracts and *engagements*: obligations which arise by the agreement of the parties on the one hand and those which arise by operation of law on the other. It would, perhaps, though the suggestion is offered with great diffidence, be a logical development that the latter should come to be regarded as those duties which arise by operation of law independently alike of contract on the one hand and status on the other. The class of engagements, logically speaking, includes the quasi-contracts and the duties which are broken when delicts and quasi-delicts are committed. My duty to repair a crumbling wall before it injures my neighbour (draft, Art. 83) or to keep my bull from goring him (Art. 81) is imposed by law (and also morality) in the same way as my duty to recompense my *negotiorum gestor*. The draft accordingly carries the Napoleonic doctrine a stage farther by suppressing the misleading words *quasi-contract*, *delict* and *quasi-delict*, and endeavouring to deal with obligations as a single whole divisible only into two main heads. Of those two heads it is broadly true to say that *causa*, in the sense of the intention of the obligee,[1] is vital to the one, namely contract, and immaterial in the other.

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[1] I reproduce this charming phrase from M. Clavel, who modestly uses it of himself, a modern Franco-Egyptian lawyer.

The *partie spéciale* of the draft is a list of contractual obligations with the rules peculiar to each of them: logically speaking, the view which the learned authors have (rightly, as we submit) taken seems to require a similar *catalogue raisonné* of the non-contractual obligations. To have attempted such a catalogue, however, would have been a titanic undertaking and would have taken them far outside their terms of reference, which were *ne point en toucher les principes fondamentaux*. That they did not do so, however, gives their draft an inevitably lopsided appearance and results in the word *obligation* being used with several different meanings. *Gestion d'affaires*, *paiement de l'indu*, *enrichissement sans cause*, all these are just as much special cases as sale or antichresis; yet they appear in the first or general part. Twelve articles, as already noted, are devoted to *actes illicites*; but nobody would pretend that these articles contain in themselves sufficient guidance as to the duties which it is an *acte illicite* to violate. In the first instance, these articles appear to envisage the breach of duties arising out of the ownership, possession or custody of material property, though they are doubtless applicable to a considerable extent to other duties as well. The place which Arts. 61 to 86 occupy in the draft and the use of the word "obligation" would appear to one accustomed to English rules of draftsmanship to imply that Chapters 2–5 (Arts. 87–270) are general rules governing these obligations in the same manner and to the same degree as those *ex contractu*. This, however, is not the case. Throughout those chapters the word "obligation" means primarily a contract; their provisions can seldom be applied to other obligations except by analogy; and often they cannot be so applied at all. Finally, there is at least one article (27) in which the word "obligation" does not imply a duty at all but is used of a void agreement.

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[1] See below.

(*d*) *Causa.*—*Causa* was, with *res*, one of the most ambiguous terms of Roman law: it would probably be an underestimate to say that it had a dozen different senses. So far, however, as the law of contract is concerned, it was logically possible (though historically, perhaps, incorrect) to discover a common element. Every variety of *causa* was either the intention with which the parties entered into the contract or it was the element of formality by which (as an historical accident) the law secured proof that they did intend to bind themselves, and guarded itself from saddling with legal duties persons who had no such intention. *Intention*, then, is all that modern French or Italian lawyers appear to mean by the word *causa*.[1] Having got thus far, the *doctrine* of the schools and the *jurisprudence* of the courts part company. A threefold nomenclature is in vogue: *causa* is distinguished from object and motive.

From object, in the words of Baudry-Lacantinerie (§ 847), in that *objet* = *quid debetur*, *causa* = *cur debetur*. This is not a distinction which is likely to commend itself to practical lawyers; in all bilateral cases the *cur A debet* is to obtain the *quod B debet*, and if the object is illegal or impossible, the *causa* is of necessity equally so. It is hardly surprising, therefore, that an Italian court has said roundly that *La causa dei contratti si identifica spesso con l'oggetto della convenzione: e però se è vero l'oggetto vera sera la causa del contratto.*[2] When the draft says (Art. 23) that the object of the contract must be lawful and (Art. 27) that a contract for an unlawful *causa* has no effect, it is really saying the same thing twice over. The draft does distinguish between object and *causa*: object is material, *causa* is a mental attitude to that material. Even the provision of the *Code Civil*, that the object must be *res intra commercium*, has been dropped, presumably because if the object is not *intra commercium*, the agreement is *sans cause*. This distinction, therefore, is of but small importance, and it seems regrettable that the authors of the draft Code decided to retain it.

That between *causa* or intention and motive is both vital and difficult; and the draft Code does not face the difficulty. *La causa dell' obbligazione è distinta dal motivo; la prima si attiene ed è inèrente all' obbietto o al contenuto stesso del contratto e della obbli-*

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[1] For the history, see "Cause and Consideration in Contracts" (F. P. Walton) in XLI, *L.Q.R.*, 306–328.

[2] A. Palermo, May 30, 1894, *Patemo* c. *Simiani*.

gazione, o forma per cosi dire la conditio sine qua non della validità e sussistenza dell' uno e dell' altra ; il motivo ne è per contro affatto estraneo . . . senza cioè quel motivo l'obbligazione non si sarebbe contratta.[1] The same difficult distinction is, of course, familiar in our own law, as, indeed, it must be in all systems. Speaking very generally, our criminal law has tended on the whole to restrict the concept of intention within the narrowest limits: "intention," says J. D. Mayne in words very similar to those just quoted, "shows the nature of the act which a man believes he is doing: motive is the reason which induces him to do the act which he intends to do and does."[2] This, as will appear, is generally in accordance with the strictest *doctrine* of French theoricians regarding *causa*. In matter of contract, on the other hand, our courts have tended (as will also appear) to agree with the more practical, if less severely logical, *jurisprudence* of the French courts.

The question arises where a plaintiff, suing on an innocent cause of action, is shown to have had knowledge of the ulterior immoral ends of the defendant; and the English rule was stated by Pollock C.B. in the case next quoted as follows: "Any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied." In *Pearce* v. *Brooks* (L.R., 1 Ex. 213) a coachbuilder was not permitted to recover the hire of a brougham let out to a prostitute who used it not merely to take the air but for the purpose of her trade—though it is hard to imagine a more modest and respectable form of carriage than a brougham. In *Upfill* v. *Wright*, [1911] 1 K.B. 506, a landlord was precluded from recovering the hire of premises let to a woman who received therein the sinful visits of the man under whose protection she lived; though obviously sin can have occupied but a small portion of her time, and she committed no sin merely by living. She must live somewhere, and it is a little difficult to see why it should be more moral for her to receive her paramour and evade her rent than to receive him and pay it. In a similar case in France the *Tribunal de Commerce* of the Seine refused to permit a wine merchant to recover the price of champagne sold to the keeper of a brothel for consumption therein. Manifestly, the connexion between the contract and the ulterior immorality was much closer than in the parallel English cases. Yet Baudry-Lacantinerie (§ 853) from the high ground of the dialectical distinction between *causa* and motive, does not hesitate to call the decision *véritablement fantastique*. He proceeds to consider the question of certain cases of gifts made in contravention of French law, and arrives, in the face of an express decision of the *Cour de Cassation*, at the conclusion that there can be no such thing as a void donation. The *causa* is always the same and always good, *causa liberalitatis*, to gratify the receiver; the motive—to reward immorality or crime, to find an outlet for spite against legitimate heirs, to favour one child at the expense of another in defiance of the laws regulating distribution of inheritance —may be reprehensible, but all this is motive and not *causa*. It does not go to the root of the existence of the contract. True, the existing French *Code Civil* has another line of defence: Art. 6 lays it down as a fundamental principle that private agreements cannot derogate from laws passed to protect public order and good morals. A similar provision is embodied in Art. 12 preliminary dispositions, *Codice Civile* (Art. 16 new draft). This has nothing to do with *causa*; but surely the same argument will apply once again in another form. If it is not in itself an *atteinte contre bonnes mœurs* to sell champagne, how can a mere knowledge of the ulterior purposes of the purchaser make it so? Am I my brother's keeper? I do not become an accessory to his misdeeds merely by putting it in his power to commit them.

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[1] C. Roma, April 24, 1883, *Agricola* c. *Asse ecclesiastico*.

[2] Criminal Law of India, § 9A. The word *causa* in the sense of intention is only used in contracts. It is the similarity of idea only which we are considering, not the different fields in which similar questions may arise.

The war gave us, as it presumably gave all nations, innumerable instances of this sort of thing. Trading with the enemy, smuggling, espionage, evading the taxes: all these things are a thousandfold more difficult to check if the subsidiary transactions which make them possible are free from any sort of risk. More recent instances have been provided by the alcohol prohibition laws of the United States: to sell alcohol to a notorious rum-runner is alleged to endanger the good relations between the United States and ourselves.

Clearly the cold logic of scholastic doctrine is out of touch with realities, and the practice of the courts is purely empirical. It is hardly surprising that some French reformers have been in favour of jettisoning the term *causa*; for law, it may be urged, is the rule of the dead over the living with a vengeance if we have to enter into dialectical refinement in order to provide an inherited technicality with a modern meaning. Yet the distinctions are real, and we do not make them easier by limiting our vocabulary.

The draft Code reflects but does not solve the difficulty. The term *causa* is, as we have already said, retained but not defined. The new second clause of Art. 27 of the draft before us has (to an English reader) the air of limiting the scope of Art. 6, *Code Civil*, meaning no more than that the plaintiff must not have been an actual party to wrong-doing. Such limitation, perhaps, was not intended. That some criterion of *motive* is necessary few will deny. The ideal, if extremely difficult, course (an English lawyer may be permitted to think) would have been to search out a logical basis for the common-sense decisions of the courts rather than a logical criticism of them.

Again, another harvest of the war was a batch of cases on the problem of subsequent impossibility or illegality of performance (which even before that time bulked largely in English law) ; and one feels there must have been a similar crop in every country concerned. It is therefore with some astonishment that we fail to find direct mention of this topic in the draft Code. Again, this stumbling-block of *causa* is responsible. A contract, the performance of which becomes impossible, becomes from that moment an *obligation sans cause :* one of which performance becomes illegal becomes an *obligation sur cause illicite*. The one as well as the other, both have ceased to exist.[1] It is only where the bar to performance is something which can be imputed to a contracting party—something for the causation or non-avoidance of which he is (even, it may be, quite innocently) responsible—that he is liable for damages.[2] In English law we go on to ask whether the impossibility or illegality was a risk which one or other party ought to have foreseen and must therefore have accepted. The difference between the two systems is well illustrated by *Jacobs* v. *Crédit Lyonnais*, (1884) 12 Q.B.D. 589 C.A.

But what about part performance already had or payments already made ? The existing French and Italian Codes appear to be completely silent on this matter : though, perhaps, it may have been the practice to deal with it by analogy from the provisions regarding *paiement de l'indu*, provisions which were not strictly applicable since in express words they only governed the refund of money which was not due at the time of making the payment. The classical Roman law provided remedies by which money could be recovered where[1] "by reason of circumstances existing at the time or arising afterwards, it was or became contrary to honesty and fair dealing for the recipient to retain it." But the only one of such remedies which has reference to subsequent circumstances is the *condictio causa data causa non secuta*; and with the utmost deference, be it submitted, it is extremely doubtful whether the Romans would have regarded subsequent impossibility as rendering it dishonest for the recipient to retain the money.[2]

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[1] This, apparently, is not classical Roman law, see below.

[2] Art. 96, draft Code. I have not overlooked Arts. 88–90, which refer only to the custody of specific objects.

It seems probable that the learned authors of the draft Code intended to cover this case by their new Art. 73 *enrichissement sans cause.* That article, it is admitted in the report, was viewed with much misgiving by the more cautious among them; but the majority who carried it take credit to themselves for the vagueness and generality of their language in propounding *une de ces règles larges et élastiques qu'il est bon de formuler dans un code, justement à cause de leur élasticité.* The bright air of the Mediterranean lands conduces, no doubt, to breadth of vision. But the vagueness lies mainly in these two little words *sans cause.* Is an obligation *sans cause* when the *cause* has ceased to exist or become unlawful? Yes, probably, in view of what has been said; though the Roman answer would have been in the main, No. But how about *causa* itself: does it mean merely intention? We may get that meaning into the phrase *causa data causa non secuta* by paraphrasing it "where the intention assigned by the plaintiff has not been brought to fruition"; and we might, perhaps, by stressing *enrichissement*, none the less give the defendant a right to retain for his out-of-pocket expenses. But that the learned authors meant their section to cover a number of other cases is certain; and it is by no means clear that the narrow definition of *causa* as intention can be maintained in this section. Certainly in Art. 4, cl. 3, another new clause, *causa* means not intention but motive. Again, it is a reasonable inference from the words of Art. 74 that a defendant who in good faith but without lawful title has been in enjoyment of my property is not regarded as being liable for mesne profits by *acte illicite* (there has been no *faute* on his part) but by *enrichissement sans cause*. There can be no question of intent, for there is no contract, and the intent of the defendant was a lawful one. If this is right, *causa* in Art. 73 includes not only intent but title.

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[1] *Cantiere San Rocco* v. *Clyde Shipbuilding Co.*, [1923] A.C. 105 at 109, per Lord Birkenhead, and see Dr. Walton's article already quoted.

[2] *Si tibi dedi ut [Stichum] intra certum tempus manumittas? . . . si Stichus decesserit, an repeti quod datum est possit? Proculus ait, si post id temporis decesserit . . repetitionem esse, si minus, cessare. Quin immo et si nihil tibi dedi, ut manumitteres, placuerat tamen ut darem, ultro tibi competere actionem quae ex hoc contractu nascitur, id est condictionem defuncto quoque eo.* D. XII. 4. 3 (3, 4, 5).

Si pecuniam ideo acceperis ut Capuam eas deinde parato tibi ad proficiscendum condicio temporis vel valetudinis impedimento fuerit quo minus proficisceris, an condici possit, videndum: et cum per te non steterit, potest dici repetitionem cessare: sed cum liceat paenitere ei qui dedit, etc., *eo. tit.* 5.

(*e*) *Faute.*—Just as the whole doctrine of contract turns on considerations of intent and rarely motive, so also the keynote of the brief provisions dealing with *actes illicites* is struck at once in the first clause of Art. 74 by the word *faute, fatto colposo*. It is the intention which is the criterion, and this fact is, if anything, emphasized by the change of wording from the existing Codes in which the act and the *faute* or *colpa* of mind which accompanies it are distinguished. Incidentally, it is impossible not to feel that something has been lost in clearness and comprehensiveness when this clause is compared with Arts. 1151, 1152 of the *Codice Civile* which it is designed to supersede. Art. 1152 makes special mention of *negligenza od imprudenza*, distinguishing them from the *colpa* envisaged by Art. 1151.

A definition of *faute* or *colpa* would have been an advantage, for it appears to have moved a long way from the *culpa* of Roman law. The second clause of this article is a new one, and is designed to provide in a single sentence a solution of the problem which has long divided French lawyers under the name of *abus de droit* —a problem which was settled for us in one sense by *Bradford* v. *Pickles*, [1895] A.C. 587, and for Germany in the exactly opposite sense by Art. 226 B.G.B., which provides that "the exercise of a right is forbidden when the sole object is to cause damage to another." With its insistence on *bonne foi* and *le but en vue duquel ce droit a été conféré* the clause is somewhat reminiscent of the administrative tribunals and their standard of the *honnête homme* to which the State, in its dealings with the citizen, should conform. Whether the new clause, if it became law, would suffice to put an end to the differences of opinion among French jurists is a question on which an outsider can express no opinion. But at least it is interesting as marking a distinct transition from the primary state of will contemplated by the first clause (whether *faute* there means intention only or the alternative of intention, rashness and negligence) to a secondary mental criterion of motive or ulterior object. It establishes such a criterion in so far as it asserts that an act otherwise legal may be illegal, and give rise to an action for damages merely because of the motive behind it.

Conclusion.—In the doctrine of *causa* as contrasted with " consideration "; in the alternative tests of *actes illicites*, *faute*, and *abus de droit*, the modern law of Europe is as definitively subjective as our own is in the main objective in character. For our objectivity we have been praised by a recent distinguished visitor to our shores[1]; and we have been shown with reference to Roman legal history how an increasing insistence on subjective as opposed to objective criteria is a mark of academic influence in the fashioning of law. Nobody could accuse our law of being fashioned under academic influences; indeed, we may permit ourselves to be mildly envious when we note that the original nuclei of the committees responsible for the present draft were academic in character. But the tendency which Professor Pringsheim is understood to deprecate, though it may make the law more difficult (and if pushed too far, impossible) to administer, does not detract from its interest and theoretic perfection. Indeed, a purely objective attitude, a refusal to face problems of the intelligence and the will, is simply barbarism, not civilization. No such charge can be brought against the draft.

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[1] Professor Pringsheim. The address is, we understand, shortly to be printed in the *Law Quarterly Review*.

SELF-DEFENCE AND INTERNATIONAL AIR POWER.

[*Contributed by* J. M. Spaight, Esq., C.B.E., LL.D.]

The Work to be Done.—Before one can understand what is involved in the organizing of international air power in the service of peace, one must first be clear in regard to the work to be done and the way in which air power will do it.

The work is, broadly, the suppressing of outbreaks of war. It is true that the ultimate end sought is international peace and freedom from war, and that that end would in fact be attained if, for reasons unconnected with the fear of sanctions or retribution, nations abstained from attacking one another. It is assumed, however, for the present purpose, that it will not be sufficient to rely upon such (voluntary) abstention and that the repression of war by some forceful means will be necessary; that, in fact, the way to deal with war is not to " kill it with kindness " but to " treat it rough," or, to change the metaphor, that " spiking the guns with olive branches " is a less effective mode of procedure than doing to them whatever it is one does do with explosive bombs. Unless that assumption is made, the question of organizing international air power for war prevention does not arise at all.

Police and Fire-fighting Work.—The work of war repression has affinities with the work of both the municipal policeman and the fire-fighter. One thinks of an international air force patrolling the world, like a constable on his beat, and preventing outbreaks of war normally by the moral influence of its mere presence, occasionally by a sharp reminder of its powers. One thinks, too, of a mobile fire-brigade smothering the incipient fires of revolt wherever they show the first flicker of a conflagration. There will, in fact, be some element of policing and of fire-fighting in the work of an international force, but there will be important differences, too.

Actually, the work which an international air force will have to perform will be something nearer to ordinary international war. No doubt in time it will tend to be policing, pure and simple, but that will be when world federation has come to pass—a time which we need not at present consider. It is a reasonable certainty that, during any future time which we need take into account at present, the task of organized air power will be to underpin national defence. Its rôle will be that of St. George, to champion the weak, to take sides with a State which is the victim of attack, and to assist that State in its defence.

The Necessity for Self-defence.—That will be so because the possibility of aggression and, consequently, of the necessity for self-defence cannot be eliminated. Under no conditions which are at present conceivable will it be possible for any international authority to give the individual States an absolute guarantee of immunity against attack. It is impossible to forbid a State to defend itself unless and until you ensure that the conditions in which that prohibition would become operative cannot themselves come into existence, that is to say, until the possibility that self-defence will be necessary can be absolutely ruled out.

Self-defence is, and must remain, lawful. One must start by establishing that proposition beyond yea or nay. It is fundamental and all-important, and, because of certain recent restrictions upon the right to make war, is sometimes in danger of being forgotten. In the Briand-Kellogg (or Paris) Pact of 1928 the civilized nations of the world have renounced wars of policy. In the Covenant they had already pledged themselves not to resort to war until methods of peaceful settlement had first been tried. In neither instrument have they surrendered the right to defend themselves against actual attack. That they reserved the right of self-defence, so far as the United States, Great Britain and France were concerned, was made clear in correspondence which passed at the time of the signing of the Paris Pact. Mr. Kellogg had already stated, in a speech delivered before the American Society of International Law on April 28, 1928, that " there is nothing in the American draft of an anti-war treaty [*i.e.* the Pact] which restricts or impairs in any way the right of self-defence. That right is inherent in every sovereign State and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territories from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defence."

The Correspondence of 1928.—These words of Mr. Kellogg's were quoted by Mr. Atherton, the United States *Chargé d'Affaires* in London, in a letter which he addressed to Sir Austen Chamberlain on June 23, 1928. In this letter Mr. Atherton added that in the view of the United States Government no specific reference to "that inalienable right of sovereignty," the right of self-defence, was necessary or desirable.

The American Government's view upon the subject was also made clear in a speech delivered by President Coolidge at Washington on November 11, 1928. He said, referring to the Pact: "While recognizing to the fullest extent the duty of self-defence, and not undertaking, as no human ingenuity could undertake, an elaborate guarantee against war, it is the most complete and will be the most effective instrument for peace that has ever been devised."

Before this, M. Claudel, the French Ambassador at Washington, had stated in a letter of March 26, 1928, to Mr. Kellogg that "*la renonciation de la guerre ainsi proclamée n'exclurait pas pour les signataires le droit de légitime défense.*"

The view of the Government of Great Britain was expressed in the statement in Sir Austen Chamberlain's letter of May 19, 1928, to Mr. Houghton (American Ambassador in London) that "Mr. Kellogg has made it clear in the speech to which I have referred above [*i.e.* the speech of April 28, 1928] that he regards the right of self-defence as inalienable, and His Majesty's Government are disposed to think that on this question no addition to the text is necessary."

Self-defence and the League.—The Covenant, too, clearly prejudices in no way a State's right to defend itself. The British official commentary upon the Covenant, issued in 1919, recognized explicitly that "the Members of the League must make their own arrangements for self-defence against any force that could be suddenly concentrated upon them. . . . To meet the first shock of sudden aggression, therefore, States must rely on their own resistance and the aid of their neighbours."

Even in the Geneva Protocol of 1924, which went considerably beyond the Covenant in restricting the right of resort to war, self-defence was reserved. The Politis Report of October 1, 1924, upon the Protocol stated: "The prohibition [of war] affects only aggressive war. It does not, of course, extend to defensive war. The right of legitimate self-defence continues, as it must, to be respected. The State attacked retains complete liberty to resist by all means in its power any acts of aggression of which it may be the victim."

The Reservation of Self-defence.—Whatever system of peace enforcement is adopted, however the Covenant or the Paris Pact may be developed, self-defence—strict self-defence—can never be outlawed or banned. It is lawful here in Great Britain, although we have a very highly developed system of government and a most efficient police force. It would have to remain lawful in the international community even if an international police was instituted. A nation can never be deprived of its right to protect itself from assault. Apart from the fact that even if a practically complete measure of disarmament were adopted, some national forces would still have to be maintained for the purpose of preserving internal order and protecting colonial territories from uncivilized tribes, the potential danger of civil aviation could not be disregarded. The instruments of offence would consequently be available. The difficulty connected with the right of self-defence is the more acute on that account in the international than in the national community; in most civilized communities citizens do not carry deadly weapons.

Anticipatory Self-defence.—The difficulty would not be so great as it is if a merely passive self-defence were all that was in question. The right to ward off an actual blow must obviously be recognized as legitimate, but a right so restricted would not be sufficient. Even at English common law you need not wait to defend yourself until you have felt the physical impact of the blow that is threatened. You are justified in anticipating it, provided you act under a reasonable apprehension of serious violence. The same principle of the lawfulness of anticipatory self-defence must be admitted as between nations, given always a real and pressing necessity for immediate action to repel a threatened attack, reasonably apprehended.

It is admitted, indeed, in the American Constitution of 1788. Section 10 of Article I forbids the separate States of the Union to engage in war " unless actually invaded or in such imminent danger as will not admit of delay." Here there is a clear recognition of the right to repel a threatened as well as an actual invasion. The fact that the provision is a constitutional one, defining the rights of the individual States in relation to the national Government, and not one purporting to determine a point of international law, does not rob the provision of relevancy to the question here under discussion. Its relevancy rests upon its bearing upon the further question, What prospect is there of the United States admitting that a right of anticipatory self-defence is not recognized in international law when such a right is implied in the American Constitution ?

The Defining of Aggression.—There is no positive rule of international law limiting lawful defence to passive defence. If there was, if the test of the quality of lawfulness for this purpose were the awaiting of the first blow, the difficulty about defining aggression would disappear. The aggressor would be the party who strikes first. Yet, admittedly, this simple test of aggression will not do. Aggression cannot, in fact, be defined at all. This was recognized by two separate bodies of experts who subjected the whole question to exhaustive examination some years ago. Their conclusions will be found in the report of a League of Nations Committee which drew up a " Commentary upon the Definition of a Case of Aggression " in 1923. This Committee, of which Lord Robert Cecil was the chairman and upon which both Army and Navy opinion was represented, arrived at the following conclusion :

> It may be accepted that no satisfactory definition of what constitutes an act of aggression could be drawn up. But even supposing that such a definition were possible, there would still be difficulty in determining when an act of aggression takes place.

The Committee quoted and endorsed the conclusion of another body of experts, the Permanent Advisory Commission of the League of Nations, who had already considered the question. The Commission had stated :

> Under the conditions of modern warfare it would seem impossible to decide even in theory what constitutes an act of aggression.

The Commission considered that neither mobilization nor the violation of a frontier could be accepted as the test. The real aggression might lie not in any physical act but in the political policy pursued by one party towards the other.

Mr. Ramsay MacDonald put the matter in a nutshell when he stated at Geneva on September 4, 1924, that " the ability to assign responsibility for aggression is about the last thing to emerge and belongs to the historian who studies and writes fifty years after a war and never to the politician who lives through the beginnings of a war." Clearly there could be no such uncertainty if such a simple and obvious test of aggression as the delivery of the first blow could be adopted. That that test cannot be adopted is the best practical evidence of the non-existence of any rule of international law that a nation is bound to wait until it is actually attacked before its defence can be considered lawful.

Defence of Rights or Interests.—It is defence against aggression, against attack, actual or imminent, which is here in question, not defence of rights or interests. The right of self-defence which international law admits must be regarded as the counterpart of the right of self-defence which an individual can lawfully claim and exercise. The latter right, at least under our English common law, is definitely limited to self-protection. Our courts have held that the use of a deadly weapon in self-defence is justified only when serious bodily danger or robbery or some similar crime of violence is attempted or apprehended. The use of force is legitimate when the purpose is to repel an unlawful attempt upon life, limb or property. It is not justified for the mere protection or vindication of legal rights. In a masterly note A. V. Dicey has shown that the common idea that a man may lawfully use the force necessary for the latter purpose is erroneous. A dispute as to legal rights, he points out, must be settled by legal action. " No one is allowed to vindicate the strength of the disputed right by the force of his arm." " Legal controversies are not to be settled by blows." The use of force is justified and limited by the strict necessities of self-defence.

The Paris Pact and Defence of Rights.—The same principle is implicit in the Paris Pact. In Article II the High Contracting Parties " condemn recourse to war for the solution of international controversies." In Article II they agree that " the settlement or solution of all disputes or conflicts, of whatever origin they may be, which may arise between them, shall never be sought except by pacific means." The reservation made in regard to the right of self-defence in Mr. Kellogg's speech of April 28, 1928, already quoted, referred specifically to defence against attack or invasion. A right of defence so defined or limited would correspond to an individual's right to defend his life, limb or property. It is true that a rather more extended connotation of the term might possibly be inferred from the references to the Monroe Doctrine or to the British Empire's special interests in certain regions of the world. But these references, too, are not inconsistent with a restricted interpretation of the rights of self-defence. Sir Austen Chamberlain, in his letter of May 19, 1928, to Mr. Houghton, referring to the regions in which this country has special interests, stated that " their *protection from attack* is to the British Empire a means of self-defence."

The reservation would not justify a State, it must be presumed, in intervening forcibly for the protection of its nationals in a foreign country. That could hardly be claimed legitimately to be self-defence. It is true that some pretext for such a claim might possibly be found in the fact that the " life " of a State embraces the lives of its nationals. It is true also that one can easily conceive situations in which measures hardly distinguishable from war could justifiably be taken by a State to save an important body of its nationals resident abroad from immediate danger to life and limb. Such a case could hardly arise, however, when two normal civilized States were concerned, and the circumstances in which protective action of the kind in question had to be taken would probably fall outside any rule regulating resort to war in the international community. Broadly, it may be said that the kind of self-defence to which the reservation can alone be reasonably held to refer is defence of a State's very existence.

The Task of Organized International Air Power.—The practical task of international air power organized for the enforcement of peace may be assumed, then, to be to stiffen lawful self-defence. It will not be merely to separate the combatants, the brawlers, and to send them both home with belaboured backs. The international force will have to assist one party against the other. A position of equilibrium, of evenly matched contestants, is not to be expected. One party is likely to be in a position of predominance and the immediate need of the occasion will be the saving of the other from perhaps irretrievable disaster. Assume that the international air force does succeed in that object and restores the balance of forces: how far can it carry the success which it has achieved ?

Here one is in face of one of the fundamental difficulties of the whole problem. The difficulty is this, that, under existing international law, a war of self-defence *need not stop at self-defence.* Once legitimately begun, it may be carried on after the immediate purpose for which it was opened has been achieved and the hostile assault repelled. The defending State may continue it for the purpose of (*e.g.*) obtaining reparations or guarantees for the future. A war of defence becomes, in fact, war " at large," not distinguishable from a war of offence. It is true that Article 10 of the Covenant of the League provides that the territorial integrity and the political independence of a State must not be destroyed ; such destruction is, however, not the only purpose for which a war may be continued beyond the point at which defence is assured. The State which was defending and is now attacking may overrun its opponent in order to obtain safeguards for the future or satisfaction in the shape of a crippling indemnity. Neither in the Covenant nor in the Paris Pact is there any specific provision that a war of defence must cease the moment that the purpose for which it began, the repelling of the attack, has been accomplished; nor is there any rule of international law to that effect. The maxim of James Mill that "what justifies entering upon a war also determines when a war ought to cease," is obviously not a maxim observed in actual practice, as many historical examples prove.

Limited Self-defence.—There is here, in fact, a divergence between the rules of international and of municipal law. It is a rule of English common law that the right of self-defence cannot justify the use of violence which is either excessive or is used after the danger has passed or by way of revenge. The measure of the violence which may lawfully be used is that which is necessary for the purpose and appropriate to the occasion. No similar limitation upon the use of violence in defensive war has as yet been admitted into the corpus of international law or the practice of nations.

Yet the acceptance of such a limitation seems to be a condition precedent to the organizing of international air power in the service of peace. Conceive what may otherwise happen. The international air force carries the defence up to a certain point. It then desists, on the ground that the object of its intervention has been achieved and that it has no mandate for going farther. "But I am going on," says the defending State; "I am perfectly within my rights in doing so. I am going to teach my assailant a lesson which he will not forget." What is the international air force to do? Is it to change sides and to attack its protégé? A situation in which the whole system of peace enforcement may be strained to breaking point is likely to be the result.

The Need for the Limitation.—Clearly the right of self-defence will have in this respect to be defined, agreed and limited if co-operation between international and national forces is to be organized. Apart from all else, a door will always be open for evasion of the prohibition of wars of policy so long as self-defence is recognized as being lawful and a war of self-defence, lawfully begun, can be continued for an ulterior, and possibly political, end. There will always be a danger that the war of (real) aggression may masquerade as a war of cleverly stage-managed self-defence. (Aggression never admits in any case that it *is* aggression.) There will be no similar inducement when self-defence is self-defence and nothing more. It need not follow, on the other hand, that a State will be tempted to disregard the ban upon aggression by the knowledge that it has nothing to fear but the repulse of its attack. There are other means of punishing an aggressor than by making him feel the whip of war or invasion. He can be subjected to trading, commercial and financial disabilities, economic boycott and other non-military constraints.

But, for the writer's immediate purpose, the chief argument for the limitation is that without it the organizing of international air power would be a terrible danger to the world. It is a mighty power. To organize it—really to organize it—will in any case be a tremendous experiment. The result might well be to bring not peace but a sword : not freedom and security for the nations, but oppression, tyranny, evils greater than the evil of war. That could not happen, or at least would be less likely to happen, if peace preservation and nothing but peace preservation were the rôle of an international force. Its task should be, so far as the special conditions of international life and conflict allow, the task of the municipal police. It should have no concern with anything but the stopping of a fight, even though, as already stated, it may have for that purpose to "take sides" with the weaker combatant. It should be a force for suppressing war, not for waging war. It will have to co-operate in defence, to stiffen defence, but that defence should be defence pure and simple, something negative, colourless, drab : not the defence which waits and listens, if only subconsciously, for the throb of drums, the bugle-note, the tramp of columns, not as a menace but as a call to the adventure, the glamour, the infinite possibilities which are war.

The Assimilation of the New Idea.—There is no ground for supposing that the world is in the least disposed to accept such an uninspiring conception of defence as that which is analysed above. In the face of all logic, of all the unmasking of war in its true character as a horror, a medley of blood, latrines and brothels, there is in men's hearts a sneaking fondness for war. Notwithstanding the serious call which the nations seem to have had since 1918, they have much of the old belligerent Adam left in their compositions still. They have certainly not yet assimilated the idea that God is a God of arbitrations and not a God of battles. They are very unlikely to swallow the equally novel proposition that self-defence is self-defence.

But they will swallow it in time. Air power will see to that. Air power will clear the way for the acceptance of the new order of ideas. It will establish the case for them by the most practical and convincing of all possible arguments. It will make war according to the new ideas, and it will show that, for sheer effectiveness, that is incomparably the best method of making war. It will show, in fact, that the way to " make war " is to prevent war from being made, to crush it, smash it, stifle it at birth.

Air power is a war-breaking rather than a war-making force. We do not grasp that truth as yet, but a hundred years or so hence it will be a commonplace. Then the world will be riper for the assimilation of the new conception of defence than it is to-day; and then only will it be safe and practicable to organize air power in the service of peace. Not only will it be safe and practicable; it will be almost inevitable. The force whose function is to immobilize attack, to pin it down, to make it impossible, is the obvious weapon of defence when defence is conceived as the prevention, the annulling, the cancellation of offence. But a long process of education and enlightenment will be necessary before the doctrine of defence and the doctrine of air power here expounded pass into the currency of political thought. One must be under no illusion that international air power is going to be organized in our time or even our children's time. Probably a generation or two, perhaps another major war or two, will have come and gone before even a modest contingential system will be practicable. The day of a true international air force controlled in peace by an international executive is very far distant.

CUSTOMARY LAW IN THE DUTCH EAST INDIES.

[*Contributed by* PROFESSOR AMRY VANDENBOSCH, *University of Kentucky.*[1]]

Preservation of Customary Law.—The recognition of native societies and institutions and the aim of developing them along their own lines is a cardinal principle of Dutch colonial policy. This policy of non-assimilation is not an easy one to follow. On the one hand it requires an accurate and profound knowledge of native life and society, and on the other hand the recognition of the diverse needs of a population so heterogeneous as that of the East Indies leads to dualism and even pluralism in the whole governmental structure. The Dutch East Indies extend over a vast area. From the northwestern point of Sumatra to the eastern boundary of New Guinea is as far as from Portland, Oregon, to Washington, D.C. Among the native populations occupying this area are found peoples in every stage of civilization and religion, and with great differences in languages, manners and customs. The population of the East Indies also comprises a million and a half foreign Asiatics—Arabians, British Indians and Chinese—and a large number of Europeans. A policy of differentiation in accordance with needs in a population composed of groups with such divergent ways of living, of social and economic development and of legal conceptions must necessarily lead to a bewildering multiplicity of law.

Though surrounded with great difficulties and involving many inconveniences, the Dutch policy of preserving and respecting customary native law is of the highest importance and significance. From the point of view of colonial judicial administration the application of Western law throughout the islands and to all racial groups would have the advantage of uniformity and certainty. Moreover, it is easier. It is no small matter for the Westerner to penetrate Eastern society for the purpose of uncovering its customary laws. It is even more difficult for the Westerner to understand and sympathize with its legal conceptions. But the imposition of an alien law not born of its own needs and consciousness can rarely satisfy a people's sense of justice, and may be the cause of grave injustices. The introduction of an alien legal system will cause natives to turn away from government courts of justice and seek makeshifts elsewhere,[1] and it contributes to the disintegration of native society. Only insuperable obstacles can justify the suppression of native jurisprudence. A knowledge and use of customary native law contributes greatly to a smooth-working administration. Reforms have the best chance of success if they tie up with native social institutions. Ignorance of, mistakes in the conception of or indifference to customary law may cause serious governmental maladjustments.[2] Native juridical communities are sometimes ignored to the great dissatisfaction of the people and the confusion of administration. A nice adjustment of official administrative units to the customary juridical units, such as villages, leagues of villages and confederations and principalities, is an important factor in colonial administration. Customary native law actually touches colonial administration at numerous vital points, such as agrarian policy, labour policy, native administration and autonomous communities. The policy followed with respect to native customary law also involves the large question of how far the alien administration shall penetrate native society, the question of native autonomy and of native auto-activity. Finally, the Dutch policy of respecting customary native law is of the highest importance because of its unexcelled contribution to the promotion of ethnological jurisprudence. Western imperialism, and the assimilation policy which is its most usual concomitant, is threatening to extinguish all other legal systems. By its policy the Dutch government is furthering a systematic study of, keeping alive and developing along its own lines one of the principal legal systems of the world, the recognition of which constitutes one of the basic principles underlying the World Court.[1]

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[1] Mr. Vandenbosch spent the academic year 1929–30 in the Netherlands and the East Indies making a study of Dutch colonial policy and administration as a Fellow of the Social Science Research Council of New York City.

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[1] This is clearly demonstrated in the Philippines where Indonesian customary law has no standing in the courts. The people keep many cases out of court and decide them among themselves on the basis of their adat. Administrative officials often utilize adat to solve social problems. It has been suggested that it would be wise even at this late date to give recognition to customary law. See "Suggested Reforms of the Civil Code Provisions on Intestate Succession based on Filipino Customs," by Javier Gonzales, *Philippine Law Journal*, vii, Nos. 4, 5 and 6.

[2] When in 1905 the Netherlands Indian government abandoned its policy of non-intervention in the internal affairs of Central Celebes, "the greatest difficulties in connexion with this meeting of East and West were experienced by the chiefs. The European administrative officials took them for men who could order their people to do anything they wanted. This was not the case . . . they exercised only adat [customary] rights. If the chief gave an order which fell outside of his ordinary jurisdiction the people refused to follow it. They did this now when the headmen, at the instigation of the officials, ordered them to make roads and carry burdens for the military police. Time and again the headmen were held responsible for the inhabitants' failure to carry out orders, although the headmen themselves were unable to demand obedience. The chiefs were also held responsible for permitting conditions which were quite natural to them but which ran counter to the ideas of the Dutch administrative officials. . . . The headmen found themselves in a strange world. They did not know what they had to do and usually preferred to withdraw, but there were few who had any desire to take their places." Alb. C. Kruyt, "The Influence of Western Civilization on the Inhabitants of Paso (Central Celebes)," in *The Effect of Western Influence on Native Civilization in the Malay Archipelago*, edited by B. Schrieke, p. 4. Batavia, 1928.

Obstacles to the Study of Adat Law.—Oriental customary law had long to wait for its discovery and appreciation by the West chiefly for the reason that it is difficult for the Westerner to penetrate oriental society and oriental forms and modes of thought. Western misconceptions and belittling of that law are largely to be ascribed to the same difficulty. "He who after the study of Netherlands law takes up the study of Dutch East Indian law enters a new world," states Professor van Vollenhoven, the foremost scholar of Indonesian customary law.[2] Oriental valuations, motives and views of good and evil are frequently strange to the Western mind. The oriental world is no longer a closed book to the Westerner, but it is a book which it has taken the Westerner a long time to read sympathetically, intelligently and accurately.

An obstacle to the study of Indonesian customary law, according to van Vollenhoven, is the utterly wrong supposition that law follows religion,[3] that heathen have heathen law, Hindus have Hindu law, Mohammedans Moslem law, Christian natives Christian law in so far as that may exist. This supposition, positively contradicted by the facts, has had, and still is having, a fatal influence. The influence of religious law is limited; and most students make the mistake of stressing the religious element of the customary law too much, and of uniting religious and customary law. A second obstacle is the tendency for Europeans to distinguish that which to the native is indistinguishable, to separate elements which to the natives are inseparable. A systematic differentiation between public and private law, penal and civil law, property and contract law, absolute and relative rights, property rights and personal rights, is for the

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[1] Statute, Art. 9.

[2] *Het Adatrecht van Nederlandsch-Indië*, i. 3, Leiden, 1918.

[3] *Ibid.*, i. 15, 16.

Indonesian without legal training inapprehensible. Nowhere in the archipelago does the native know or practise the distinction between ownership and possession.[1]

" Adat "-law has come into general usage among the Dutch as the term applied to Indonesian customary native law. " Adat " is the Arabian word for "custom." (There is a large Arabian population in the East Indies. Mohammedanism has also engrafted a number of Arabian words on the native language.) Adat-law is that part of the law applicable to the natives, and also the foreign Asiatics, which is uncodified. A distinction is made between adat-law and indigenous law, the latter being that part of the adat-law which remains after the religious elements have been deducted. There is no one and the same adat-law for all of the East Indies. Indeed, the East Indies are divided into about twenty adat-law areas or districts each with an adat-law different from that of the other districts. But in the adat-law of all these areas there is a large common element, and this common element van Vollenhoven has outlined in a sort of skeleton code for the whole East Indies.[2]

Scientific Study of Adat-law.—There was very little study of adat-law during the period of the East Indian Company, 1602–1800, although here and there a few individuals interested themselves in the subject. The real ground-breakers for the study of Indonesian adat-law were three Englishmen : Marsden (1754–1836), a colonial official who collected considerable material in Sumatra ; Raffles (1781–1826), the Governor of Java during the English occupation from 1811–1816 ; and Crawford (1783–1827), one of Raffles's subordinates. A fellow-pioneer of the three Englishmen was the Dutchman, Muntinghe (1773–1868), who was a Dutch colonial official in Java when the British conquered it, and who remained to serve as one of Raffles's right-hand men.[3] During the period from 1800 to 1865, which van Vollenhoven characterizes as " Western reconnoitring," some good work was done by individual colonial officials, but none to equal that done by the four great pioneers. Confusion of adat-law with the exotic religious law, of folk law with princely codes, of code law with living law, was a common mistake made by the investigators of this period. None of the early investigators had a conception of adat-law as a coherent body of material crying for investigation and precise study. And of any conception of the importance of adat-law material for governmental administration and legal history there was not a glimmer during this period.[1]

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[1] Van Vollenhoven C., *Miskenningen van het Adatrecht*, pp. 49, 54, 57. Leiden, 1909.

[2] *Een adatweboekje voor geheel Indie.* Leiden, 1910.

It should be noted that Indonesian adat-law is not confined to the native population of the Dutch East Indies, but prevails also among the inhabitants of Madagascar, British Malaya, British Borneo, the Philippines and a large part of Formosa. On the other hand, the people of Central and Southern Dutch New Guinea are not Indonesian, and the Indonesian customary law is unknown among them.

[3] The best history of the discovery of Indonesian customary law is a book by van Vollenhoven, *De Ontdekking van het Adatrecht.* Leiden, 1928.

A convergence of circumstances caused a new interest in adat-law about 1865. The agrarian policy in the East Indies was for several years a leading issue in the States-General and the subject of heated debate. Much of the discussion in these debates centred about adat-law. The agrarian problem is closely linked up with adat-law, and it was a very encouraging omen that the States-General began to recognize this, for many injustices have been committed against the natives through ignoring or misunderstanding customary agrarian law.[2] As a result of this debate the government issued a proclamation to the people of Java guaranteeing them a recognition of their right to individual and communal land, and promising that these rights would be protected against every invasion. A few years later the East Indian government made an agrarian investigation in Java and Madura.

The Civil Service now also began to manifest an interest in customary law. Previous to this time officials had received little training in native languages and social institutions, so that they arrived on the field poorly equipped to make investigations. About this time the course of study in this respect was much improved and a widespread interest in adat-law soon became noticeable among the civil servants. While recognizing that much fine work was done during this period by the East Indian civil servants, van Vollenhoven makes several critical observations about this work.[3] The use of juridical terminology detracted from the intelligibility of the data ; there was often lacking an understanding of Eastern classifications, valuations and ways of thinking as differing from those of the West ; the articles contained much historical fantasy ; and most of the material was drawn from the outer islands on the apparent assumption that there was no adat-law in Java. During this period Protestant missionaries became interested in adat-law, in family and inheritance law in particular. The jurists were recruited from law graduates who had had absolutely no Indian orientation, hence were unprepared for the investigation of adat-law, and little disposed to have any sympathy for it. However, their attitude underwent a change and a few men did outstanding work in the field.[1]

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[1] Van Vollenhoven, *De Ontdekking van het Adatrecht.* Leiden, 1928, pp. 82, 83.

[2] See van Vollenhoven, *De Indonesier en zijn Grond.* Leiden, 1919.

[3] *Ontdekking,* p. 96.

Three men stand out in this period as the founders of the scientific study of adat-law. The first of these is Wilken, whose work van Vollenhoven declares to be of the first order and remarkable both for its extent and its richness.[2] Wilken, who was the son of a missionary stationed in the Celebes, served eleven years in the East Indian Civil Service, and became a professor in the Leyden Indian Training School in 1881. Here until his death ten years later he laboured ceaselessly, lecturing and writing. The second of these men was Liefrinck, for thirty-five years a member of the East Indian Civil Service, who after his retirement published three important volumes on the adat-law of Bali and Lombok. The third of the founders of the scientific study of adat-law is C. Snouck Hurgronje, the world-famed Moslem scholar, whom van Vollenhoven characterizes as a language scholar who became a statesman. Leyden conferred upon him the doctor's degree in 1880, on a thesis written on an Islamic subject. The next year he was made lecturer on Islamism at the Leyden Indian Training School, and in 1884–5 he made his famous entry into Mecca, spending several months there disguised as a Mohammedan, but forced precipitately to flee because of an indiscretion by the French consul at Djedda. In Mecca Snouck Hurgronje mingled as much as possible with the East Indian colony of students and in this way learned about many of the adat-law institutions prevailing in the East Indies. While at Leyden he was an intimate friend of Wilken. In 1889 he was sent out by the government to make a study of Islamic institutions in the East Indies; in 1891 he was made adviser for eastern languages and Mohammedan law. The title of his position was later changed, first to that of adviser for native affairs, and later, 1899, to that of adviser for native and Arabian affairs. During all these years he was engaged not only in scholarly investigation of native institutions, but doing statesman-like work in serving the government with recommendations on policy. Throughout his seventeen years in the Indies Snouck Hurgronje lost himself in the native society and remained as much as possible outside of European social life. Few Westerners have learned to know oriental life from within as has he. In 1906 he returned to the Netherlands to enter upon his work as professor at Leyden University, from which he retired in 1927.[1] Snouck Hurgronje was the first to use the term "adat-law" to designate those adats or customs which have legal consequences, in distinction from those other usages and conceptions which are without legal consequences.[2]

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[1] *Ontdekking*, pp. 112–18.

[2] *Ibid.*, p. 99.

The period since 1900 has been one of deeper discovery and of Western interpretation of adat-law.[3] Adat-law students began to see that to understand Eastern or primitive institutions they had to proceed from an Eastern or primitive point of view. For this the new spiritual atmosphere in Holland was most favourable. After 1900 the spiritual currents decisively turned away from "the rationalism and materialism of the century just closed and [the Dutch] acquired an open mind for archaic and Eastern thinking, mystical and mediæval thinking, un-European and un-materialistic thinking."[4]

It is significant that the leading workers in the field of adat-law during this period were jurists. One of them, van Ossenbruggen, just recently ended his East Indian career as president of the High Court. It was in this period that adat-law finally found its great advocate and its genius in the person of Professor C. van Vollenhoven. Made professor of colonial law at Leyden University shortly after the turn of the century, he has in the course of the last thirty years performed prodigious labours in investigating, systematizing, and directing the investigation, study and collection of Indonesian customary law. In van Vollenhoven were united all those qualities which he himself once laid down as necessary in an adat-law scholar-statesman: "Reverence for the indigenous element in customary law, a vigilant eye for the legal needs of the Indians, understanding of an altogether different system of law, and all this applied to living Indian law." From his key position as professor of colonial law at the university at which the candidates for the East Indian Civil Service received their training van Vollenhoven was able to exert a tremendous influence, both on policy in the East Indies and on the States-General.[5] A score or more of doctoral dissertations within the field of adat-law have been written under his direction. As a result of his influence there are now going forward two large collections of adat-law material.[1]

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[1] Among Snouck Hurgronje's published works are *De Atjehers*, two volumes, of which there is an English translation under the title of *The Achehnese*, 1906; *Het Gajoland en zijne bewoners*, 1903; *Verspreide Geschriften*, 1923–1925, six volumes.

[2] On Snouck Hurgronje and the discovery of adat-law, see van Vollenhoven, *Ontdekking*, pp. 106–10.

[3] *Ibid.*, pp. 123 ff.

[4] *Ibid.*, p. 125.

[5] Professor van Vollenhoven's published works on adat-law include the following: *Het adatrecht van Nederlandsch-Indie*, two volumes, 1918; *Miskenningen van het adatrecht*, 1909; *De Indonesier en zijn grond*, 1919; *Een adatwetboekje voor geheel Indie*, 1910; *De ontdekking van het adatrecht*, 1928.

Opposition to Customary Law and its Protagonists.—The friends of customary native law have had to maintain a long contest for its preservation, and the controversy which the contest engendered is still going on. It flames up anew with every question involving adat-law in any way. And it has not been a case of the friends of the natives all ranged on one side and the ruthless imperialists on the other. Among the advocates of unification was found Van Deventer, an ardent friend of the natives and one very active in their cause. Nor was the question a simple one ; great problems had to be faced, whichever direction was taken. In general it may be said that there is a fairly close connexion between the views on adat-law and those on administration. The protagonists of adat-law generally favour the protectorate principle and the withdrawal of European officials from the lower reaches of the governmental service, while the adat-law antagonists favour a further penetration by European administration.

Van Deventer stated his position in a leading article in *De Gids*,[2] February 1905, when the controversy over unification was at its height. He endorsed the statement so often used by Macaulay in the debates on Indian law reform, " Uniformity when you can have it, diversity when you must have it ; but in all cases certainty." The principle of specialization should not become the basis for reform of the legal system in the East Indies, for the reason that it would be in conflict with the now rapidly developing juridical integration of the world. Now that the people of the world were being brought closer together by the new means of communication and transportation people everywhere were feeling the need of removing the obstacle of differences in law. The Netherlands stood at the head of the movement for the unification of international private law, and yet in its own dependency, which could be called a microcosm of small nations, it would lead the law in a direction the disadvantages of which it had first experienced within its own boundaries, and which it now felt it had to abandon as harmful in the community of nations.

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[1] *Adatrechtbundels*, under the auspices of the Royal Institute, begun in 1910, already comprises twenty-six volumes ; *Pandecten van het Adatrecht*, begun in 1914, published by the Colonial Institute of Amsterdam, of which there are now eight volumes.

[2] Article also found in Colenbrander and Stokvis, *Leven en Arbeid van Van Deventer*, ii. 187 ff.

Other opponents of customary law lay emphasis on the need of certainty of the law, a certainty which the frequently vague, always incomplete and often chaotic adat cannot furnish. They also assert that it does not constantly develop with growing needs, and instead of always reflecting the conviction of the people it just as often represents merely the ascendancy of the powerful and the "respectable." It is contended that adat-law is incapable of fulfilling the legal needs of the increasing intercourse between the different juridical groups, that several legal institutions such as commercial paper and corporations are unknown to customary law. Judges often oppose it, because in the application of law they desire, first, completeness, an answer to at least the main questions; and second, orderliness, not a loose conglomeration but a systematic whole. Others again assert that adat-law is useful only in the simple, primitive society which gave it birth, and that the attempt to apply it to any of the larger problems of modern life is futile.[1]

"Twenty-five years ago," so wrote van Vollenhoven in 1925,[2] "jurists, progressive politicians and mission friends were very nearly unanimously agreed that hope of deliverance was to be expected from 'European law for all.' The jurists, because they would then have a positive text as the basis for their civil jurisprudence or their legal opinions, and because British India had already experienced the bliss of reforms along this line; the progressive politicians, because European law being superior and better law would help to stimulate the economic senses of the natives and raise their welfare; mission friends, because the Christian Indonesian would be inducted into our family life through European law and to a recognition of the individual and his worth." But these attitudes have undergone great change. It was learned that the experience in British India had not been so happy, and that there was a marked turning away from the unification movement on a Western basis to which Macaulay had given such impetus. Politicians now plead for differentiation and missionaries are agreed that the same codified law for all native Christians is inadvisable.

The position of the protagonists of customary law is that law is a phenomenon of living society, that it is in a fluid state, in restless interaction with other social forces. Law must answer social needs, and people differing in outlook, and in varying stages of economic and social development must each have their own law. For each people its own customary law is best, for it is born of their needs and of their sense of justice, and grows with their development. Consciousness of right comes not from the law, but law should come from it. Customary law is living law, and if code law differs from it maladjustment and unfairness result.

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[1] For the point of view of those who oppose adat-law or warn against its overvaluation, see I. A. Nederburgh, *Tegenstellingen en samenwerking in Ned.-Indie*, The Hague, 1925; F. C. Hekmeijer, in *Indische Gids*, 1906; A. Van Gennep, *Indische Genootschap*, December 1910; G. J. Nolst Trenite, *Vragen des Tijds*, December 1922.

[2] "Juridische Confectiewerk," *Koloniale Studien*, 1925, i. 293 ff.

The defenders of customary law also admit the need of greater certainty of the law, but hold that codification on a Western basis, by applying to the natives a new law which they do not at all understand, would create even greater uncertainty.[1] They also favour codification, but codification of customary law, on such broad lines that the code will be valid for as large a district as possible, with room for local deviations to meet local customs. Such a code should regulate only that which conforms to predominant convictions and which can remain unchanged for an indefinite period.[2]

Customary law profited by a reaction against code law. Van Vollenhoven frequently makes short shrift of code jurists and the passive machine-like judge. A leading jurist,[3] friendly to customary law and opposed to codification, points out that the distinctive mark of codification lies primarily in the shifting source of the law. Before codification the judge must seek the rules of law in the intercourse of people; after codification he finds it in a book. Codification was not so much a deed of creation as a description of what was the living law at the moment, but codes were not an exact description of the living law at the time of codification, and with time become less so.

After a century of experience Europe is able to judge the results of codification. The advantages of certainty and uniformity were claimed for it, but the certainty is not one hundred per cent., for the best lawyers and judges often do not know what the law is on a certain point. The code is very large, and judges sometimes overlook articles, laymen still oftener. Much injustice results from tying the judge to the code. The code deals with the abstract, but the judge has to deal with a concrete case. There are thousands of cases which the law did not foresee, and circumstances are often such that a rule, fair in the abstract, becomes unfair when applied in the concrete. Codes should be merely guides for aiding the judge in his search for the living law, but the judge should seek always to go back to the living law, to the social facts, and must be free to do so. Adat-law, which is still uncodified, and for the most part still unwritten, is still exclusively living law.[1]

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[1] Van Vollenhoven, *Miskenningen*, p. 64.

[2] *Ibid.*, pp. 5, 6.

[3] J. André de la Porte, *Over codificatie van materieel privaatrecht in het bizonder van Nederlandsch Indisch adatrecht.* Leiden, 1918.

This sociological jurisprudence has its difficulties. The large number, some twenty, of adat areas, make for conflicts now that these areas are no longer isolated and the population becomes more mobile. Furthermore, in an awakening country like the East Indies, there is not one stage of social and economic development but many, and the legal system must satisfy the needs of widely varying social milieus. With the social and economic development of the natives new legal needs suddenly spring into existence and new conceptions are awakened. Customary rules in conformity with them at the moment are lacking. A most striking example of this occurred when whole sections of the archipelago went over to Christianity in mass. There was some attempt made to prepare Christian customary law. The Governor-General is empowered under the East Indian Organic Act to declare the civil law applicable to them, but these people could not thus summarily be thrust under European law merely because they had gone over to Christianity. The East Indian government faces the problem of providing a legal system which on the one hand will protect from injurious upheaval the slowly developing base of the Indonesian social pyramid, and on the other hand will be elastic enough to meet the needs of the rapidly advancing small group with Western orientation ; a legal system which will answer the needs of the communal adat communities and the needs born of modern administration, intercourse and education, and which will cover the relations in the villages and those in the large cities.[1]

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[1] The British in Malaya first ignored adat-law, but have learned to discover its value, and are preserving it.

" Customary law does not lend itself to codification, and there can never be any finality, for the law, even where reduced to enactments, is a living thing. Slowly perhaps, but inevitably, every system must change ; unless it steadily develops and adapts itself to the progressing needs of the people it must fall into decay. Some degree of certainty in the law is, however, indispensable to the proper administration of justice, and case law possesses that combination of certainty and elasticity which is best suited to the present needs of Rembau, especially since the principle is one with which the people are familiar. The adat was built up to a large extent by decisions of the Ruling Chief and lembagio, and is therefore comparable to the Common Law of England, which still possesses vitality and adaptability, to a remarkable degree. . . . Many old points of adat are still in doubt, and new cases will arise to which old principles must be applied. Changes must come, but they should be allowed to come gradually ; if those who administer the law take ample case notes and preserve their decisions in accessible form, the unhappiness of violent changes will be averted."—E. N. Taylor, " Customary Law of Rembau," *Journal Malayan Branch of Royal Asiatic Society*, vii. 1929.

Legislative History of Customary Law.—There are four important dates in the legislative history of Indonesian customary law. Until 1747 the East Indian Company had not interfered with the native administration of justice, except that in its port cities or factories it had applied Dutch law to Orientals and Occidentals alike. But in this year it decided to extend its justice to all the natives of Java, but those living outside of the large cities of Batavia, Semarang and Soerabaya would remain under their own customary law. In 1824 the East Indian government abolished this exception, and from this time forward customary law was applied to all the Orientals in the country; and in 1854 this regulation was embodied in the East Indian Organic Act. In 1919 this provision was changed to the effect that customary law should gradually be replaced by statutory law. However, adat-law must be respected unless there are good reasons for applying universal private law to all the racial groups, or for applying either European or other specific provisions to natives.

For the purposes of judicial administration all people in the East Indies, including visitors, are divided into three categories: Europeans, natives and foreign Asiatics. Under the first category come all Europeans, all Japanese (since 1899), all other persons who in their own country would be subject to a family law in principle resting on the same principles as the Dutch family law, and their children, legitimate or legitimately recognized. Under the classification of natives come all those who belong to the indigenous population of the East Indies, and also those who have become absorbed in the native population. In case of mixed marriages, the wife comes under the category of her husband, the children those of the father. Illegitimate children, unless legally recognized by their father, come under the category of their mother. The status of native Christians may be separately regulated. Under the category of foreign Asiatics come all non-indigenous Asiatics, save Japanese and Christians. The status of the latter may be separately regulated by ordinance.

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[1] See B. Ter Haar, "Een keerpunt in de adatrecht-politiek," *Koloniale Studien*, 1928, No. 1, p. 246; and A. D. A. de Kat Angelino, *Staatkundig Beleid en Bestuurszorg in Nederlandsch-Indie*, ii. 1071–2, 1085 ff.

With respect to justice for natives the East Indies is divided territorially into two systems of jurisprudence, government and native jurisprudence. This territorial division does not coincide with directly and indirectly governed territory, for native jurisprudence is sometimes found in directly governed areas, and the reverse is also true. Native jurisprudence is different from government jurisprudence in three respects: it has its own judicial organ, resting upon the adat institutions of the people concerned; it has its own procedural law, that of the customary law, stripped of all practices in conflict with recognized principles of fairness and justice; and it has its own crimes and adat penalties. However, the customary law penalties are nowhere fully maintained, but have been modified by regulations based on Western conceptions.

Encroachment on customary law may take place in several different ways. Some provisions of substantive private law may be made applicable to members of all categories. Certain provisions at first applicable only to Europeans and foreign Asiatics have later been extended to natives. Included under these are management and discipline on East Indian merchantmen and the hiring of servants and employees. Certain legal provisions apply to all persons coming into the stated legal relationship. Natives may also withdraw themselves from the jurisdiction of their customary law by voluntary submission in whole or in part to European law. Complete submission is irrevocable and takes place by a process not unlike naturalization. In this case the whole of European civil and commercial law becomes applicable to them. For this submission a married man must have the consent of his wife; the submission extends to the wife. The submission of the father and unmarried mother extends to their wards, children and their descendants. The submission leaves unchanged the right to the exercise of native rights to land. Natives may also partially submit themselves to European law, in which case only certain parts of the Dutch civil and commercial law become applicable, and they come into the legal position of the foreign Asiatics other than the Chinese. A third form of submission is the submission for a given legal transaction. In this case only that part of the civil and commercial law immediately related to the transaction becomes applicable. Silent subjection forms a fourth form of withdrawal from customary law. For certain transactions not regulated by adat-law, but solely by European law, the native is assumed to have voluntarily submitted himself to the

European law for that transaction. Life insurance is an example of such a transaction.[1]

Customary law appeal cases now go to the Councils of Justice and the High Court, both European courts. The members of these courts are not experts in customary law; a proper development of customary law is therefore excluded. Mr. Ter Haar, professor of colonial law at the East Indian Law School, advocates a special High Court for appeals in adat-law cases.

There is also in Java and Madura, because of the Mohammedan population, a religious jurisprudence, exercised by priest councils, since certain legal questions such as family and personal law can, according to the Koran, be decided only by a believing judge. There is much complaint of spoliation in these courts, and measures are under consideration to limit their jurisdiction.

The whole European law was in 1919 and 1925 made applicable to Chinese, save for a few minor matters like adoption. However, their cases still come before the native courts. Other foreign Asiatics, with the exception of the Japanese, of course, who are assimilated to the Europeans, are subject to the Dutch civil and commercial law, with the exception of family and inheritance law. In so far as European private law is not applicable to them they are subject to their own customary law. With respect to adjective law the foreign Orientals are assimilated to Europeans in civil cases, but they are assimilated to natives in criminal cases.[2]

For several years past there has been a demand for eliminating as much as possible the differences in law and judicial proceeding between the different racial groups. The first result of this movement was the creation in 1914 of the *landgerechten*, courts for handling minor offences, by whomever committed. However, the preliminary examination in case of Europeans is performed by European officials. Before 1918 there was both a European and a native criminal code, but both were based on the French criminal code, so the difference was largely formal. In 1918 even this difference was removed by the substitution of a common code.

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[1] For voluntary submission, see A. C. Tobi, *De vrijwillige onderwerping aan het Europeesch privaatrecht*. Leiden, 1927. The number who have voluntarily submitted themselves to European law is small. It naturally appeals only to the more advanced natives, but it is just among these that the sentiment of nationalism is strongest. The nationalists regard submission as a form of denationalization.

[2] The Chinese are clamouring to be assimilated to Europeans in adjective law in criminal cases and to have their cases come before European courts. The problem is primarily a financial one, since the assimilation of 1,200,000 Chinese would require an enormous increase in judicial personnel. The East Indian government has declared its willingness to accede to their wishes, but the present financial situation makes its execution impossible for the present. See " A Problem in Java," by A. Vandenbosch, *Pacific Affairs*, November 1930.

Conflict of Law.—So many different kinds of law within the same general jurisdiction must naturally mean a large number of cases of conflict of law. Fewer cases arise than might be expected, due probably to the fact that the population is still rather immobile. As the population develops and becomes more mobile these conflicts are bound to increase in number ; however, the increasing mobility of the population as a cause of increase in conflict of law will be offset by the greater amount of uniformity which it is sought to bring into the law, at least as far as the main outlines are concerned. Various terms have been applied to the law governing these conflicts. The term " quasi-international private law " has been used, and also " inter-racial " law, when it involves conflicts between the legal systems of the various races or ethnological groups, and " inter-local " or " inter-regional " law when it involves a solution of the conflicts between the divergent customary law of different localities.

The East Indian Organic Law fails to state what law shall be applied to these conflicts of law. The Governor-General and the Volksraad (legislature) may regulate this as they see fit. Inter-racial law regulations on specific subjects, such as mixed marriages, have been laid down, but such regulations are still few. Hence the courts are quite free in these cases. In cases of conflict of civil law the courts, in the absence of special rules, must decide what law is applicable, basing their decisions upon the intention of the parties, the nature of the legal relationship, the needs of social intercourse and analogies of international private law.[1]

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[1] In ironing out the conflicts of inter-racial and inter-local law the courts often face very knotty problems. However, the courts have in the course of the years pricked out the main lines of this quasi-international private law. In case of a person who has permanently left his adat community his personal adat-law ceases to apply to him ; the local adat-law where he now resides applies. There is thus a shift from personal or inter-racial to inter-local law. Sometimes European law becomes applicable to such groups, depending upon the nature of the case. In case of conflict or mixed marriages the rule is that property descends according to the law of the deceased. Acknowledgment of illegitimate children is permissible if permissible under the law of the acknowledger. Since no acknowledgment of parenthood of illegitimate children is permissible under Mohammedan law, it means that most natives cannot acknowledge. See R. D. Kollewijn, *Hethoogerechtshof van Nederlandsch Indie en het intergentiel recht.* Weltevreden, 1928.

A COMPARISON OF THE GENERAL PRINCIPLES OF CRIMINAL LAW IN ENGLAND WITH THE "PROGETTO DEFINITIVO DI UN NUOVO CODICE PENALE" OF ALFREDO ROCCO. II.

[*Contributed by* W. T. S. STALLYBRASS, ESQ., D.C.L.]

II. MENS REA.

IT is not easy to arrive at the true meaning of *mens rea* at the present day. Sir James Stephen went so far as to say [1] that "the expression itself is unmeaning." But the influence of the phrase on the development of English criminal law has been great. It is no doubt due to the fact that the principle of punishment as opposed to compensation dominates this branch of law, and the expression goes back to the time when felonies alone were regarded as "crimes" truly so called. Felonies, said an old writer,[2] are apparently so named from the Latin word *fel,* in English "gall"; or from the old English word "fell" or "fierce," or because they are understood to be acts done "felleo animo, with bitter, fel, fierce or mischievous mind." In the old cases *mens rea* did involve moral blame, and did mean a guilty mind, and there is in consequence "a widespread notion that you cannot be guilty of any penal act unless you have an immoral or wicked mind in what you did. That to my mind is wrong." "The true translation to my mind of *mens rea* is 'criminal intention' or, to put it at greater length, 'the intention to do the act which is made penal by the statute, or by common law.'" [3] The change that has come about in the meaning of this expression is due to the greater precision of modern statutes.[4] But it has long been a settled principle of English law that "every man, if he be a rational man, must be considered to intend that which must necessarily follow from what he does." [5] This is a rule of common sense no less than of law; "the only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his act." [6] But though it is a rule of common sense, it appears to imply a confusion between intention and the will.[7] It follows, however, that according to English law

[1] *Hist. of Criminal Law,* ii. 95.

[2] *Termes de la Ley* (1624 ed.), p. 198.

[3] *Per* Shearman J., in *Allard* v. *Selfridge,* [1925] 1 K.B. 129.

[4] *Per* Stephen J., in *Cundy* v. *Lecocq,* (1884) 13 Q.B.D., p. 210.

[5] *Per* Alderson B., in *R.* v. *Gathercole,* (1838) 2 Lew., p. 255.

[6] Stephen, *Hist. of Criminal Law,* ii. 111.

[7] *Relazione,* i. 88.

it is a mistake to say that a man does not intend a consequence because he does not desire it. Intention and desire usually go hand in hand, but not always. If A shoots at B, desiring to kill him, knowing that he may but not desiring to kill C who is in the way, he has in law intended the death of C, if he kill him, though he has not desired it.[1] Bentham[2] calls this an indirect or oblique intention; Mercier[3] would not call it intention at all. But in law it is a perfect example of an intended act. And in effect it would be so treated also under the *Progetto definitivo*.[4] But the *Progetto* does not take the next step taken in English law: that the intention to do an illegal act, not necessarily even criminal, *e.g.* a tort, is sufficient to constitute *mens rea*.[5] In cases of homicide a doctrine of constructive crime, which is repugnant to modern feeling,[6] found its way into criminal law. As tempered by modern decisions, it amounts merely to this: that the man who commits a felony with violence in circumstances in which he must know that what he is doing is a danger to life, is guilty of murder if he kills anyone.[7] So stated the rule seems to be merely an application of the principle that a man is deemed to intend the natural consequences of his act.

It may here be noted that if A under provocation shoots at B and accidentally kills C, he will be guilty of manslaughter, not murder.[8] The privilege of the occasion covers the remoter consequences as well as the desired consequences of the intended act. A similar rule is found in the *Progetto definitivo*.[9]

Where, however, a particular intent or state of mind is of the essence of the offence, in order to obtain a conviction the prosecution must prove the existence of that particular intent.[10] But it is wrong to say that in such cases the particular intent is itself the *mens rea*; it is included in it but not identical with it.[11] The *mens rea* is still the intention to do an illegal act. In such cases if harm of the kind intended is done, though it be produced in a manner or upon a subject that was not intended, it is imputable,[12] but not if it be of a kind not intended. So if a man pick up a stone and throw it at a person and unintentionally break a window he is not guilty of "malicious" damage to property.[13] A similar provision is to be found in the *Progetto definitivo*,[14] but there it is of general application and is not limited to those crimes where a particular intent is of the essence.[1] And the *Relazione* provides[2] a useful test in determining what in this connexion is an offence of the same kind. "*Per riconoscere quando l'offesa sia della stessa specie o di specie diversa, occorrera aver riguardo essenzialmente alla natura del bene giuridico leso, ossia alla obiettività giuridica, identica o meno, a cui si volge l'intento del colpevole.*"

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[1] Cp. *R.* v. *Gore*, (1611) 9 Co. Rep. 81a.

[2] *Morals and Legislation*, ch. viii.

[3] *Criminal Responsibility*, pp. 45, 52.

[4] Art. 85.

[5] Anon., (1497) Y.B. 13 Hen. VII. f. 14; *R.* v. *Prince*, (1875) L.R. 2 C.C.R. 154.

[6] Cp. *per* Field J., in *R.* v. *Franklin*, (1883) 15 Cox 163.

[7] *Director of Public Prosecutions* v. *Beard*, [1920] A.C. 479. But a harsher interpretation of this important case was taken in *R. v. Betts*, (1930) 22 Cr. Ap. R. 148.

[8] *R.* v. *Gross*, (1913) 23 Cox 455.

[9] Art. 64.

[10] *Morgan* v. *Caldwell*, (1919) 121 L.T. 148.

[11] Stroud, *Mens Rea*, p. 15. Cp. *Mousell* v. *L. & N.W. Rly. Co.*, [1917] 2 K.B. 836.

[12] *R.* v. *Latimer*, (1886) 17 Q.B.D. 359.

[13] *R.* v. *Pembliton*, (1874) L.R. 2 C.C.R. 119.

[14] Arts. 85, 86; *Relazione*, i. 137–8.

It is even within the competence of the legislature to enact that certain offences shall be punishable even in the absence of *mens rea*. Where the penalty incurred is not great, the public hurt considerable and the proof of the *mens rea* difficult, the legislature tends ever more to dispense with the requirements of the *mens rea*.[3] This is perhaps necessary under the conditions of modern life,[4] when "criminal law is being forced into paths which are essentially non-criminal,"[5] and we find that in Art. 46 of the *Progetto definitivo* liability is imposed for *contravenzioni* (which tend to cover the field of our statutory crimes) for a man's own conscious and voluntary acts in all cases of negligence as well as of intention. English law goes farther: in some cases it imposes liability upon a master for the acts of his servant done without his knowledge and contrary to his express orders,[6] and that even where a particular intent has been made necessary for the constitution of the offence.[7] And this vigorous extension of the principle of vicarious liability has even been carried to the extent of holding a man liable for the criminal act of a complete stranger. Thus in *Parker* v. *Alder*[8] a farmer put pure milk on a train; during transit it was adulterated without his knowledge or consent by the fraudulent act of a stranger, and he was convicted under the Food and Drugs Act of selling adulterated milk! In all such cases, of course, the personal innocence of the defendant is a "matter which might well be taken into account in assessing the punishment to be imposed."[9]

We thus see that the requirement of a blameworthy mind is no longer universal. Let us look for a moment at the obverse of the picture. Here the law has not changed. The excellence of a man's motives are not now, and never have been, a defence for an otherwise criminal act. "The question of motive is immaterial."[10] "The old sound and honest maxim," said Cockburn C.J.[1] in 1868, "that you shall not do evil that good may come, is applicable in law as well as in morals."[2] And the *Progetto definitivo* recognizes[3] "*L'avere agito per motivi di particolare valore morale o sociale*" merely as an extenuating circumstance. Extenuating circumstances are in England a matter, not of law, but for judicial discretion in determining the quantum of the punishment.

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[1] But there are exceptions in the case of particular crimes, *e.g.* Arts. 430, 433, 435, 571, 591, 592, 598.

[2] i. 137.

[3] Wills J., in *R.* v. *Tolson*, (1889) 23 Q.B.D., pp. 172–8.

[4] Cp. Sayre, "Criminal Responsibility for the Acts of Another," in 43 *Harvard Law Review*, (1930) 689, pp. 712–16, 719–22.

[5] *Ibid.*, p. 719. Yet such vicarious liability is not limited to the so-called "quasi-criminal" offences. Thus in *R.* v. *Duke of Leinster*, [1924] 1 K.B. 311, the offence was a misdemeanour punishable with two years' imprisonment.

[6] *Allen* v. *Whitehead*, [1930] 1 K.B. 211.

[7] *Mousell Bros.* v. *L. & N.W. Rly. Co.*, [1917] 2 K.B. 836.

[8] [1899] 1 Q.B. 20. It has been said (41 *Harvard L.R.* 399) that these are not really cases of vicarious liability, but rest upon a legislative requirement that the defendant must account at his peril for any breaches arising from the conduct of his business. This seems to ignore the fact that vicarious liability is usually a case of liability without fault (cp. Salmond, *Torts* (7th ed.), p. 16).

[9] *Per* Lord Hewart in *R.* v. *Duke of Leinster*, [1924] 1 K.B., p. 316.

[10] Lord Sterndale, M.R. in *R.* v. *Poplar Borough Council*, [1922] 1 K.B., p. 103.

Contrasted with English law, how admirably direct and simple is the definition of the mental element in *delitti* contained in Art. 47 of the *Progetto definitivo*, with its analysis of crimes as those which are "*doloso, o secondo l'intenzione; preterintenzionale, o oltre l'intenzione; colposo, o contro l'intenzione,*" the meaning of each clearly explained. "A crime is malicious (*doloso*) or intentional when the injurious or dangerous event, which is the result of the act or omission and upon which the law makes the existence of the crime depend, is foreseen by the actor and desired as a consequence of his own act or omission. A crime is preterintentional or beyond the intention when an injurious or dangerous event more serious than that desired by the actor is the result of the act or omission. A crime is negligent (*colposo*) or contrary to the intention when the event, even if foreseen, is not desired by the actor and occurs in consequence of negligence or imprudence or lack of skill or non-observance of the laws, regulations, orders or instructions." And this is reinforced by the provisions of Art. 46: a man is not to be punished for a *delitto* unless it has been committed *con dolo*, except where the law specifically provides that the crime may be *preterintenzionale o colposo*, and no one is to be punished for an act or omission as an offence unless it has been committed *con coscienza e volontà*. And the law is to determine those cases in which the event is otherwise placed to the account of the actor, as a consequence of his act or omission.

Even in the restricted, almost nominal sense in which *mens rea* is used in modern law it may yet be negatived by the circumstances of the act. I have already discussed "accident" or *caso fortuito* as a defence, and will now proceed to deal with the other cases in which, according to English law, the absence of *mens rea* negatives the imputability of the offence.

(i) *Mistake of fact.* Ignorance of the law will not excuse any man, citizen or foreigner.[4] If such evidence was admitted "there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case."[5] Even if a change in the law could not be known to the prisoner he will not be excused.[6] This cruel but necessary rule is deliberately[1] put in the forefront of the *Progetto definitivo*, but is limited to ignorance of the penal law. For that it is categoric and without exception.[2] Canon law treats ignorance of the law as a defence where it is not due to negligence,[3] and Ferri's *Progetto* took a step in the same direction,[4] but the ruthlessness of the categoric imperative of English law and of Rocco's *Progetto* seems necessary in the interest of society. If the ignorance be not blameworthy, it can be taken into account in fixing the punishment.[5]

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[1] *R.* v. *Hicklin*, L.R. 3 Q.B., p. 372.

[2] Cp. *R.* v. *Senior*, [1899] 1 Q.B. 283; Dr. Kenny in 31 L.Q.R. 299.

[3] Art. 66.

[4] *R.* v. *Esop*, (1836) 7 C. & P. 456; *Re Barronet*, (1852) 1 E. & B. 1.

[5] *Per* Lord Ellenborough, in *Bilbie* v. *Lumley*, (1802) 2 East 469.

[6] *R.* v. *Bailey*, (1800) Russ. and Ry. 1. But if a continuous act or proceeding, not ordinarily unlawful, is commenced before the passing of an Act which prohibits it, it cannot be treated as unlawful by reason of the passing of the statute until a reasonable time has been allowed for its discontinuance (*Burns* v. *Nowell*, (1880) 5 Q.B.D. 444).

"Mistake in and of itself is no defence whatever to a man who has acted under a mistake. There is certainly no greater merit in being mistaken than in being right."[6] But mistake may be of importance to negative the existence of a state of mind essential to a crime. In order that *mens rea* may be negatived two conditions must be fulfilled: (*a*) the mistake of fact must be such that had the mistake not been made there would have been no offence,[7] (*b*) the mistake must be reasonable.[8] If these conditions be fulfilled, a mistake of fact will (except in the case of minor statutory offences[9]) be a good defence in English law.[10] So Art. 51 of the *Progetto definitivo* treats mistake of fact as a defence, but rejects the distinction between vincible and invincible error,[11] except in those cases where the mistake is due to negligence and the offence is one where negligence is sufficient to constitute it. That is more favourable to the accused than English law, under which an unreasonable mistake would be no defence to proceedings for bigamy, though bigamy can scarcely be described as a *delitto colposo*.

So far the law is clear. The real difficulty is to distinguish mistakes of law from mistakes of fact.[12] The law on this subject in England is obscure, and I propose to state it with rather more dogmatism than the state of the authorities justifies.[13] Where a particular intent is a necessary ingredient of any crime, a mistaken but bona fide belief by the defendant that he has a right to do the act may negative the criminal intent.[14] So where a game-keeper took a pheasant which the prisoner had trapped, and refused to give it up until the prisoner threatened to blow out his brains if he did not, an indictment for robbery failed: the prisoner's impression that the pheasant was his property negatived the *animus furandi*.[1] And in such a case, according to an Australian decision, it is not necessary that the belief should be reasonable.[2] Where, however, a specific intent is not part of the offence a claim of right must have some reasonable ground for its assertion [3] and it is useless to set up one that is impossible in law.[4]

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[1] *Relazione*, i. 30–31.

[2] Art. 5.

[3] *Codex Juris Canonici*, can. 2202, § 1.

[4] Ferri, *Principii di Diritto Criminale*, p. 460.

[5] *R.* v. *Bailey*, *ubi supra*; *R.* v. *Davis*, (1928) 20 Cr. Ap. R. 166.

[6] 41 *Harvard Law Review*, pp. 559 *sqq*.

[7] *R.* v. *Prince*, (1875) L.R. 2 C.C.R. 154.

[8] *R.* v. *Jones*, (1874) 12 Cox 628.

[9] Cp. *Anderson* v. *Rose*, (1919) S.C. (J.) 20; *Beattie* v. *Waugh*, (1920) 57 Sc.L.R. 471.

[10] *Levett's Case*, (1638) Cro. Car., p. 538; *R.* v. *Tolson*, (1889) 23 Q.B.D. 168. Contrast the statutory provision in Criminal Law Amendment Act, 1922, s. 2, and see *R.* v. *Keech*, (1929) 21 Cr. Ap. R. 125.

[11] *Relazione*, i. 91.

[12] Stroud, *Mens Rea*, pp. 55–6.

[13] See Note A, *infra*.

[14] *R.* v. *Twose*, (1879) 14 Cox 327; *R.* v. *Boden*, (1844) 1 C. & K. 395; *R.* v. *Curtiss*, (1925) 18 Cr. Ap. R. 174.

The *Progetto definitivo* in Art. 51 deals with this difficult topic by providing that a mistake in the law other than penal law excludes the possibility of punishment only in those cases in which the mistake has caused a mistake in a fact constitutive of the crime. This is hardly a complete solution of the difficulties which have embarrassed English lawyers. The difficulty is: What is a mistake of law and what of fact? In the case of the pheasant above referred to the prisoner was ignorant of a statute which made the game-keeper's seizure of the pheasant lawful. But this mistake of law led to a mistake of fact: he thought the game-keeper was the felon, and not himself. Even so, it was clear that he was not entitled to reacquire possession of his pheasant by a threat to blow out the game-keeper's brains. But the general tendency of English decisions has been to admit the defence of mistake wherever the supposed right would depend upon mixed questions of law and fact.[5]

(ii) *Incapacity*. (*a*) *By reason of non-age*.—By the common law a child below the age of 7 years is incapable of crime: there is an irrebuttable presumption that the necessary *mens rea* is wanting.[6] Where *mens rea* is an essential element in the offence there is a presumption that a child between the ages of 7 and 14 has not sufficient capacity to know that what he did was wrong; but this presumption may be rebutted by clear and strong [7] evidence of design, concealment or exceptional ferocity,[8] *quia malitia supplet aetatem*. There is, however, an irrebuttable presumption that a boy under 14 is incapable of sexual offences.[9] "After the age of 14, he is presumed to be responsible for his actions, as entirely as if he were 40." [10] To this rule there are, however, now certain statutory exceptions; an infant (*i.e.* a person under the age of 21) cannot be adjudicated a bankrupt, or be convicted of offences under s. 159 of the Bankruptcy Act, 1914. Statute has, however, for the purposes of trial and punishment, subdivided the period from 14 to 21 into two: from 14 to 16 an infant is under statute known as a "young person," and from 16 to 21 as a "juvenile adult." By ss. 102 and 103 of the Children Act, 1908, no infant under 16 can be sentenced to death or to penal servitude; no child under 14 can be sentenced to imprisonment, which is replaced by detention, in most cases not exceeding one month. For those under 14 there are industrial schools; for those under 16 reformatory schools and for "juvenile adults" Borstal institutions, set up under the Prevention of Crime Act, 1908. The Children Act, 1908, also introduced, by s. 99, a vicarious pecuniary liability for the parents of children (*i.e.* under 14) and young persons where their neglect has conduced to the commission of the offence.

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[1] *R.* v. *Hall*, (1828) 3 C. & P. 409. Cp. *Farey* v. *Welch*, [1929] 1 K.B. 388.

[2] *R.* v. *Nundah*, 16 S.R. N.S.W. 482. The American decisions are not in agreement with each other on this point: see Keedy in 22 *Harvard L.R.*, pp. 84–5.

[3] *Watkins* v. *Major*, (1875) L.R. 10 C.P. 662.

[4] *Hargreaves* v. *Diddams*, (1875) L.R. 10 Q.B. 582.

[5] Stroud, *Mens Rea*, p. 60.

[6] *Anon.*, (1487) Y.B. 3 Hen. VII, f. 1, Hil. pl. 4.

[7] *R.* v. *Gorrie*, (1918) 83 J.P. 136.

[8] *R.* v. *Dean*, (1629) 1 Hale P.C. 25 n. (*u.*); *Anon.*, (1313) 24 Selden Society, p. 148; *R.* v. *York*, (1748) Fost. 70.

[9] *R.* v. *Cratchley*, (1913) 9 Cr. Ap. R. 232.

[10] *Per* Erle J., in *R.* v. *Smith*, (1845) 1 Cox 260.

The Italians, being a more Southern race, develop quicker and reach maturity earlier than the English; it is therefore surprising to find that they reach the age of criminal responsibility later. Children under 14 are by Art. 100 of the *Progetto definitivo* incapable of crime, and the prosecution must prove affirmatively a capacity of understanding and will in children under the age of 18,[1] and in such cases the punishment is reduced. These provisions involve some change in the existing law,[2] and are justified in the light of the discretionary power given to the judge in the infliction of punishment. The *Progetto* in Art. 146 provides special establishments for the reception of minors under 18, where instruction is to be given. But there is little attempt to apply the Borstal principles,[3] for when they have attained the age of 18, if there are still more than three years' imprisonment to be served they are transferred to the ordinary adult prisons. In such cases they are therefore not saved from the pernicious contact with hardened older prisoners. Under Art. 173 of the *Progetto definitivo* in respect of offences punishable with not more than one year's imprisonment, the judge may, after taking into account the gravity of the offence, in his sentence abstain from pronouncing a conviction. There is a similar provision for "judicial pardon" in s. 1 of the Probation of Offenders Act, 1907, where it is not limited to the case of minors.

How far have Italy and England moved along the path of civilization since the days of the "Lübeck apple-proof"! By that, if a child was convicted of homicide, responsibility was tested by offering him an apple and a penny. If he chose the penny capacity was held to be established, and the ordinary legal consequences followed.[4]

(*b*) *By reason of insanity.*—The law of England on this subject is contained in the answers given by the judges to the House of Lords in *M'Naghten's* Case[5] in 1843. These answers may be summarized as follows:

(1) Every man is presumed to be sane until the contrary is proved to the satisfaction of the jury.

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[1] Art. 101; *Relazione*, i. 146.

[2] *Relazione*, i. 146–7.

[3] *I.e.* detention in an institution for treatment and training rather as an "inmate" than as a "prisoner." See Kenny, *Outlines of Criminal Law* (12th ed.) pp. 509–10; Ruggles Brise, *The English Prison System*, ch. viii.

[4] R. His., *Geschichte des Deutschen Strafrechts bis zur Karolina*, p. 7.

[5] 10 Cl. & F. 200.

(2) To establish the defence of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that he was doing what was wrong. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.

(3) If the accused did the act, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury or of producing some public benefit, he is nevertheless punishable if he knew he was acting contrary to law.

(4) If a person is labouring under partial delusion he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.

(5) A medical witness who has not seen the accused before trial should not be asked whether on the evidence he thinks the accused was insane.

In spite of the immense advance in the medical understanding of insanity, these rules, formulated in 1843, still remain the law of England, as has often been recently emphasized in the Court of Criminal Appeal.[1] They form the centre of an acute controversy between the legal and medical professions. Criticism of the rules takes two main lines of attack. First, the rules, it is said, are too narrow in that they only recognize insanity owing to defect of cognition and not owing to defective wills or emotions. They reduce madness, said Sir James Stephen,[2] to " a possible cause of innocent mistakes as to matter of fact and matters of common knowledge." They do not recognize uncontrollable or irresistible impulse as a defence. A Committee on Insanity and Crime appointed by Lord Birkenhead and presided over by Lord Atkin (as he now is) reported[3] in 1924 in favour of a change in the law. They recommended that : " it shall be made clear that the law does recognize irresponsibility on the ground of insanity where the act was committed under an impulse which the prisoner was, by mental disease, in substance deprived of any power to resist." Continental codes freely recognize moral insanity and irresistible impulse as exculpatory pleas.[4] The result of the M'Naghten rules is that a different test of responsibility is applied in the case of the sane and the insane. If either knowledge or control of his actions is proved to be absent in a sane man, he is held not to have intended or not to have willed the act with which he is charged. But under the rules, in the case of the insane, power of control is inferred from the possession of knowledge.[5] But in spite of these powerful arguments the M'Naghten rules are still the law of England. Nor has there been any substantial support among the lay public or the legal profession in favour of the proposal for a change.

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[1] And see the lecture of Lord Hewart L.C.J., given to the Medical Society of London in 1927, reprinted in his *Essays and Observations*.

[2] *Hist. of Criminal Law*, ii. 168.

[3] Cmd. 2005, p. 8.

[4] *Encyclopædia Britannica* (12th ed.), s.v. Insanity, 613 a, b.

[5] Wilson, *Responsibility in Law*, pp. 75–6, 135–6.

Such a phenomenon must have some explanation. It is necessary to consider the circumstances under which the rules were formulated. They were framed to answer the question: When is an insane person criminally responsible? They have been treated as providing an answer to the question: When is a man insane? This misunderstanding is unfortunate. They served a useful purpose at the time in putting an end to the demand that insanity should in no circumstances be accepted as an excuse for crime. But on a strict interpretation they are so drafted that hardly anyone (certainly not M'Naghten himself nor Violet Gibson) [1] is mad enough to come within them.

Clearly they are not in practice applied in accordance with this strict interpretation. In spite of the statements of Lord Chief Justice Hewart to the contrary,[2] " the illustration of the law is very much more generally liberal than would be the case if it were carried out in strict accordance with the letter. In practice, the judge, the counsel, the jury, the witnesses and all concerned are desirous, in case of uncontrollable impulse, to acquit the accused on the ground of insanity." [3] Statistics show that between 1901 and 1922, of 1,445 persons sent for trial for murder, 485, or about 34 per cent., were found insane. No one can suppose that the 485 satisfied the tests imposed by the rules in *M'Naghten's* case. Again, in courts of summary jurisdiction the plea of kleptomania is often successfully raised,[4] for such courts have no power to commit an accused to be kept in custody as a criminal lunatic, and therefore the plea can be raised without incurring the risk of a life-sentence in an asylum.[5] Yet such cases do not fall within the strict interpretation of the rules.

The second line of attack is upon that which we have called the fourth rule. " Mind is one and indivisible," said Lord Brougham [6] as long ago as 1848. " We cannot, therefore, in any correctness of language, speak of general and partial insanity." Or as a distinguished doctor recently said: [7] " the fallacy is founded in the popular idea of monomania, a condition which does not exist; the fact is that a person cannot have an insane delusion and be perfectly sane in other directions." On the other hand, it cannot be denied that insanity may vary in intensity. " There can, therefore, be no fixed standard of sanity, nor will it be possible to fix on an invariable line of division separating the sane from the insane. We must, therefore, look for another test of responsibility than that of sanity for practical service." [8]

[1] Ferri, *Il Progetto Rocco* apud *Principii di Diritto Criminale*, pp. 824–5.

[2] *R.* v. *Kopsch*, (1925) 19 Cr. Ap. R., p. 51.

[3] Atkin L.J., at the Medico Legal Society, (1925) 159 *L.T.Jo.* 436.

[4] Kenny, *Outlines of Criminal Law* (12th ed.), p. 57.

[5] Atkin L.J., *ubi supra*.

[6] *Waring* v. *Waring*, (1848) 6 Moo. P. C. 341. Cp. Stroud, *Mens Rea*, pp. 73–81.

[7] Dr. G. A. Watson at the Medico-Legal Society (1930), 169 *L.T.Jo.*, 106. Cp. Keedy in 22 *Harvard L.R.*, pp. 87–8, and authorities there cited.

[8] Wilson, *Responsibility in Law*, pp. 53, 71. Cp. Mercier, *Criminal Responsibility*, p. 225.

It cannot too clearly be borne in mind that the courts have to determine not the question of insanity but the question of criminal responsibility. As McCardie J. well said [1] in directing the jury at the trial of Ronald True: "Insanity, from a medical point of view, is one thing: insanity from the point of view of the criminal law is a different thing. Doctors exist to cure physical and mental ills. Judges and juries exist to guard the life and property and the welfare of society." Even if the only medical evidence called is that at the time of the act the prisoner was certifiably insane, the judge is not bound to direct the jury that they must find him insane, but he should direct them in accordance with the rules in *M'Naghten's* case. That was the main point of legal interest in the case of Ronald True.[2]

The present position of the English law cannot be better summarized than was recently done by Mr. A. L. Goodhart, of Oxford University: [3] "With insanity as such the law has no concern. It is concerned with insanity only in so far as the disease has caused an act. In other words, the doctor asks, 'Is the man insane?'; the lawyers' question is, 'Did the insanity cause the act?' If it did not, then it is immaterial whether or not the man is insane. . . . Insanity may cause an act . . . by destroying (*a*) a man's reason, (*b*) his moral character. The medical profession urges that the law should take into account both these results of insanity. This the law has refused to do. . . . Why has the law refused to accept uncontrollable impulse as an excuse? The reason is an entirely practical one—difficulty of proof. In fact, it is impossible at present to distinguish between an uncontrollable impulse and an uncontrolled one."

Under the German Code of Penal Procedure [4] official experts report for the guidance of the tribunals on questions of alleged criminal responsibility, and a similar practice prevails elsewhere on the Continent. In England the courts are reluctant to transfer to medical experts the determination of facts which are properly, according to English law, a question for the jury.[5] But it cannot be denied that "the medico-legal problems of responsibility in mental disorders are still in an archaic state on account of the unfortunate fact that the rules of evidence which were invented for the normal are not favourable for the presentation of facts which have a psychiatric bearing." [6]

It is obviously of great interest to an Englishman to see the solution provided by the *Progetto definitivo* for these problems which have caused so much controversy in his own country. The ground is covered by Arts. 91, 92, 93 and 99. By Art. 91 imputability is excluded where the accused committed the act "through infirmity in such a state of mind as to exclude the capacity of understanding or volition." The infirmity may be either mental or physical.[1] The defence of uncontrollable impulse is therefore recognized.[2] Art. 92 provides for the reduction of punishment in cases of partial mental deficiency, *i.e.* where the capacity of understanding and volition is *largely* diminished. The medical objections to the recognition of partial insanity are admitted but are subordinated to the need for dealing with intermediate mental conditions, whilst the diminution of capacity must be substantial in order to bring a case within the Article.[3] Art. 93 explicitly states that conditions of emotion or passion neither exclude nor diminish responsibility, but they may be taken into account as an extenuating circumstance in fixing the punishment under Art. 66, where the motives are of particular moral or social value, or the act has been done under the influence of crowd-psychology. Finally, Art. 99 provides for the non-imputability of deaf-mutes who have no capacity of understanding or volition.[4]

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[1] Carswell, *Trial of Ronald True*, p. 246.

[2] *Ibid.*, p. 39. Reported in 16 Cr. Ap. R. 164 (1922).

[3] "Recent Tendencies in English Jurisprudence," in *Essays in Jurisprudence*, pp. 46–7.

[4] § 293; cp. § 81.

[5] Cp. *R.* v. *Thorne*, (1925) 18 Cr. Ap. R. 186.

[6] Dr. Adolf Mayer, in *Encyclopædia Britannica*, 1926, Supp. ii, p. 479.

By an historical accident (probably to please Queen Victoria, whose life had recently been attempted by a lunatic [5]) the jury in England can no longer acquit the accused on the ground of insanity, but must bring in a special verdict that he was guilty of the act or omission charged against him, but was insane so as not to be responsible at law for his actions at the time when the act was done or the omission made.[6] The Atkin Committee above referred to recommended [7] the abolition of this ridiculous form of verdict, and the substitution of the verdict: "the accused did the act (or made the omission) charged but is not guilty on the ground that he was insane so as not to be responsible according to law at the time." The Legislature has not, however, yet given effect to this obviously sensible recommendation. But in spite of the language of the special verdict at present in use it is treated as a verdict of acquittal, and there is no right of appeal.[8] When such a verdict has been returned the prisoner is ordered to be kept in custody as a criminal lunatic till the King's pleasure is known. This is in almost all cases equivalent to a life sentence. Hence in practice the plea of insanity is almost entirely confined to those cases in which the penalty of death may be inflicted, and a judge recently (improperly) even suggested [9] to a jury that it would be better for the prisoner to bring in a verdict of guilty of murder with a recommendation to mercy than a verdict of "guilty but insane." But, though it is a life sentence, everything is done that is possible to make the asylum conditions at Broadmoor, where such persons are kept, as happy as possible.[1]

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[1] *Relazione*, i. 141–2.

[2] Yet the case of Violet Gibson would not, according to Ferri, be covered: *Il Progetto Rocco* apud *Principii di Diritto Criminale*, pp. 824–5.

[3] *Relazione*, i. 142. So "lessened responsibility" is recognized expressly in the new German and Swiss draft codes, and in effect in the Czechoslovakian draft code. See Dr. Junckerstorff, in *Journal of Comparative Legislation*, Third Series, vol. xi, pt. 4, pp. 205 *sqq.*

[4] *Relazione*, i. 145–6.

[5] Sir Herbert Stephen, in *The Times*, December 15, 1920. Dr. Wood Renton's statement (*Encyclopædia Britannica* (12th ed.), p. 613) that this form of verdict was substituted for the old verdict of "acquitted on the ground of insanity" "in the hope that the formal conviction recorded in the new finding might have a deterrent effect on the mentally unstable" appears to be historically inaccurate.

[6] Trial of Lunatics Act, 1883.

[7] Cmd. 2005, p. 12.

[8] *Felstead* v. *R.*, [1914] A. C. 534; *R.* v. *Taylor*, [1915] 2 K.B. 709; *Re Pitts*, [1931] 1 Ch. 546.

[9] Roche J., in *R.* v. *Lloyd*, (1927) 20 Cr. Ap. R. 139.

The provisions under Art. 228 of the *Progetto definitivo* seem much more satisfactory. By that Article, in the case of acquittal on the ground of insanity or chronic intoxication the accused is to be confined in a criminal lunatic asylum for not less than two years, and in the case of the most serious crimes for a period of not less then ten years.

It may here be noted that the treatment of supervening insanity in England is different from that provided under the *Progetto definitivo.* If the accused becomes insane before trial, he cannot be tried until his recovery. If he is unable to plead, the court may, under the Criminal Lunatics Act, 1800, order him to be detained during the King's pleasure. The same fate awaits him if, though able to plead, he is found to be insane during the trial. The *Progetto definitivo* does not appear to deal with these possibilities.[2]

Insanity may also supervene after verdict. In the case of prisoners under sentence of death the sentence will not be carried out if the Home Secretary, acting upon medical certificates, so orders. Ever since the days of Coke [3] it has been held contrary to common law that an insane person should be executed. The reasons given for the rule are more various than they are convincing. In practice no prisoner has since 1840 been executed as to whom a certificate of insanity has been given.[4] The inquiry made by the medical men in such cases ranges over the prisoner's state of mind both at the time of the crime and at the time of the inquiry. In this way there is a most effective review of the jury's verdict if it be against the prisoner.[5] In theory, in such a case the prisoner is removed to an asylum only until such time as he recovers his reason and is ready to undergo his punishment. But the practice is different. "Once granted, a respite on the ground of insanity is never withdrawn. The public conscience . . . cannot stomach the monstrous logic of the law." [6] The monstrous logic of the law is, however, explicitly retained in Art. 152 [7] of the *Progetto definitivo*, under which the suspension of the punishment is ordered, not as in England by the executive through the Home Secretary exercising the King's prerogative, but by the judge. It therefore does not afford that opportunity of review by an independent person in a case of error in the court of trial which the English practice gives.

In cases of prisoners other than those under sentence of death the procedure is, except as to unimportant details, the same, and the Home

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[1] Troup, *Home Office*, p. 127. For a popular account of Broadmoor see Moseley, *The Convict of To-day*, cc. 1–3.

[2] It seems that they would be dealt with by the application of *misure di sicurezza* under Art. 212. Cp. *Relazione*, i. 257–8.

[3] Early seventeenth century. 3 Inst. c. 1, p. 6. Cp. Hale, 1 P.C. 35.

[4] Cmd. 2005, p. 17.

[5] Cp. Troup, *Home Office*, p. 69.

[6] Carswell, *Trial of Ronald True*, p. 41.

[7] Cp. Art. 226.

Secretary may order the removal of the prisoner from prison to an asylum until discharged or remitted to prison. But the Court of Criminal Appeal is reluctant to allow a term of imprisonment to follow upon detention in an asylum.[1] In corresponding cases under the *Progetto definitivo* the period in the asylum is not taken into account as reducing the period of imprisonment.[2]

It should be noted that the Home Secretary has these powers over prisoners even before trial, and it has sometimes been said that this power is exercised too freely.[3]

Finally, under the Mental Deficiency Acts, 1913 and 1927, the court in summary proceedings may make an order that a defective person be dealt with as such without proceeding to a conviction. This is the only case in English law in which insanity as such, even though it do not involve an inability to subsume the facts under the law, affords immunity from conviction for crime. Provisions are made for guardianship and institutional treatment. Mental defectiveness covers a condition of arrested or incomplete development of mind existing before 18 years of age, whether arising from inherent causes or induced by disease or injury. The Act of 1927 classifies as defectives: (*a*) idiots, *i.e.* those with mental defectiveness so marked as to make them unable to guard themselves against common physical dangers, (*b*) imbeciles, *i.e.* those incapable of managing or learning to manage their own affairs, (*c*) feeble-minded, *i.e.* those requiring care, (*d*) moral defectives, *i.e.* those exhibiting criminal or vicious propensities.

(*c*) *By Reason of Drunkenness.*—Drunkenness is closely allied to insanity, and medical authorities tend to treat drunkenness as a form of insanity. Thus Dr. Mercier says:[4] "It is literally and exactly true that drunkenness is insanity; that as long as and as far as a man is drunk, so long and so far he is insane." Anyone in the condition of an habitual drunkard, we are told,[5] "must be regarded as temporarily insane." But in English law "it is not insanity,"[6] and in most cases its juridical effect is quite different, a difference due to the fact that insanity arises from the visitation of God, drunkenness in almost all cases from the voluntary act of the accused.[7]

But "drunkenness is one thing and the diseases to which drunkenness leads are different things. . . . If you think," said Stephen J., in directing the jury in *R.* v. *Davis*,[8] "he was so insane—that if his insanity had been produced by other causes, he would not be responsible for his actions—then the mere fact that it was caused by drunkenness will not prevent it having the effect which otherwise it would have had, of excusing him from punishment." Such a case is that of *delirium tremens*. But these cases are not really cases in which the defence is drunkenness, but insanity, and it is as cases of insanity that they are tried.[1]

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[1] *R.* v. *Kenneally*, (1930) 22 Cr. Ap. R. 52.

[2] *Relazione* i. 197. Contrast Criminal Lunatics Act, 1884, s. 2(2).

[3] *Encyclopædia Britannica* (12th ed.), p. 613b, note.

[4] *Crime and Insanity*, pp. 45–58.

[5] *Encyclopædia Britannica* (12th ed.), sub.-tit. "Drunkenness," p. 602b.

[6] *Per* Holroyd J., in *R.* v. *Rennie*, (1825) 1 Lew. 76. Cp. *Director of Public Prosecutions* v. *Beard*, [1920] A.C., p. 479.

[7] *Per* Alderson B., in *R.* v. *Meakin*, (1836) 7 C. & P. 297.

[8] (1881) 14 Cox 563.

But these are rare cases. The usual case is that of drunkenness caused by a man's own voluntary act, which does not entirely "dethrone his reason," to use Lord Coleridge's expressive phrase in Meade's case.[2] In such cases the test of insanity should not be applied; in order to establish the defence of drunkenness it must be proved that at the time of committing the act the accused was so drunk that he was incapable of forming the intent to commit it.[3] Where an essential in the crime is a particular intent, drunkenness may negative the existence of intent.[4] But "evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts." [5] But "drunkenness may be taken into consideration to explain the probability of a party's intention in the case of violence committed on sudden provocation" [6] or in the case of self-defence.[7] It is doubtful whether the defence of drunken mistake is limited to such cases.[8]

Where drunkenness is not a defence, it may be according to the facts a mitigating or an aggravating circumstance. The man who normally has a strong head but through lack of sleep or some other cause becomes intoxicated on less than he could usually carry might adduce this in evidence as mitigation of his offence, but the judge[9] who treated it as a good ground for acquittal was obviously wrong.

But if a man be made drunk by the fraud or stratagem of another, if the drunkenness is not due to his own voluntary act, then he is not responsible for his acts.[10]

Now let us turn to the provisions of the *Progetto definitivo* on this topic. Drunkenness is never an aggravating circumstance unless it is predetermined or habitual.[11] Drunkenness due to *caso fortuito o forza maggiore* is a complete defence for the man who at the time of the offence had no capacity of understanding or volition, and if such capacity is *greatly* diminished, the punishment also is diminished.[12] Neither the

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[1] *Per* Lord Birkenhead L.C., in *Beard's* case, [1920] A.C., p. 500.

[2] [1909] 1 K.B. 895.

[3] *Beard's* case, *ubi supra*.

[4] *R.* v. *Hadfield*, (1870) L.R. 1 C.C.R. 253.

[5] *Per* Lord Birkenhead, in *Beard's* case, p. 502.

[6] *Pearson's* case, (1835) 2 Lew. 144.

[7] *R.* v. *Gamlen*, (1858) 1 F. & F. 90.

[8] *Sic* Stroud, *Mens Rea*, p. 103; *contra* Kenny, *Outlines* (12th ed.), p. 61, and (semble) *Beard's* case, p. 504.

[9] Palles C.B., in *Mary* v. *R.*, (1887) in Kerr's *Inebriety or Narcomania*.

[10] *Per* Park J., in *Pearson's* case, (1835) 2 Lew. 144.

[11] Arts. 95, 97; *Relazione*, i. 143.

[12] Art. 94.

Progetto nor the *Relazione* explains what in such a case is meant by "*caso fortuito*," but the *Relazione* seems to equate it with "*accidentale*,"[1] which Ferri explains[2] as "*quando si beve per bere e non per ubriacarsi.*" It is true that this is distinguished from negligent drunkenness *quando si beve sapendo che si finirà per ubriacarsi*, but even so limited it would afford a defence in a large number of cases which in England would be heavily punished. It would clearly cover such a case as that of *Mary* v. *R.*, referred to above. Would it also protect such a person as Mr. James, who got drunk at a wedding "by reason of folly and not premeditation" and was sentenced to twelve months' imprisonment for manslaughter when he killed someone with his motor-car ?[3] On the other hand, the *Progetto* is more severe than English law in another respect. If the drunkenness be voluntary or negligent, even a complete absence of capacity of understanding and volition will provide no defence. This seems inconsistent with the general requirement in Art. 88 of such a capacity for imputability.

By Art. 98 chronic intoxication (which includes *delirium tremens*[4]) is treated as a case of total or partial insanity under Arts. 91 and 92, but by Art. 97 habitual drunkenness, so far from providing a defence or diminishing the punishment, increases it. But it is very difficult to distinguish chronic from habitual drunkenness,[5] as is indeed admitted by Rocco himself in his *Relazione*.[6]

Drunkenness induced in order to commit the offence or to prepare an excuse for it is a ground for augmentation of the punishment under Art. 95. This would seem a very difficult thing to prove.

In all other cases drunkenness neither excludes nor aggravates nor diminishes responsibility.

Stupefying substances are by Arts. 96 and 97 treated in the same way as alcohol.

It is noteworthy that the *Progetto* does not deal specifically with drunkenness as negativing the existence of a particular intent.

The *Progetto* provides, by Art. 228, for persons acquitted on the ground of insanity or chronic intoxication, incarceration in a criminal lunatic asylum, for the minimum periods already stated ; in cases where the punishment is diminished on account of partial insanity and of chronic drunkenness, detention in a special establishment for cure and custody is provided for ; but in the case of crimes of negligence freedom under supervision may be substituted.[7] These special establishments are not yet in existence.[8]

In England the State's efforts to reform the habitual drunkard have not been successful. An Act of 1879 provided for privately owned licensed retreats for inebriates who desired to be detained there. There are four for women and one for men, and they have been partially successful. The Inebriates Act, 1898, provided inebriate reformatories for persons sent there by the courts. This experiment was a complete failure and all the reformatories are now closed. It will be interesting to see whether the Italian experiment will be more successful.

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[1] i. 143.

[2] *Principii di Diritto Criminale*, p. 516.

[3] *James* v. *British General Insurance Co.*, [1927] 2 K.B., p. 325.

[4] Which may occur at a time of complete abstinence : *Relazione* i. 145. Cp. *United States* v. *Drew*, (1828) 5 Mason 28.

[5] Ferri, *Principii di Diritto Criminale*, pp. 516–17.

[6] P. 145.

[7] Arts. 225, 227.

[8] Ferri, *Principii di Diritto Criminale*, p. 516.

(iii) *Coercion.*—This must be distinguished from physical constraint where there is no *actus reus.*[1] In that case the accused *agitur non agit.* But English law recognizes that *coacta voluntas est etiam voluntas.* The general rule of English law was correctly laid down in 1838 by Lord Denman C.J., in *R.* v. *Tyler,*[2] in his direction to the jury as follows: "I am bound to tell you that where parties" from a fear of violence to themselves "are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. You probably . . . never saw two men tried at a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other, and had not been influenced by that fear in the conduct he pursued: yet that circumstance has never been received by the law as an excuse for his crime, and the law is that no man, from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind. . . . It cannot be too often repeated, that the apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal." But it is well settled that in cases of treason and riot it is a good defence to show a force upon the person and a present fear of death and that the defendant escaped from the illegal proceedings as soon as he could.[3] Any less rigorous rule, as Sir Michael Foster pointed out,[4] would put it in the power of any leader in a rebellion to indemnify all his followers. In no other cases has coercion *per minas* been recognized as a defence. "Criminal law," wrote Sir James Stephen,[5] "is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, If you do it I will hang you. Is the law to withdraw its threat if some one else says, If you do not do it I will shoot you? Surely it is at this moment when temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary." To an Englishman accustomed to a system in which judicial discretion as to the fitting punishment for crimes is so wide the proper way to deal with coercion seems to be to take it into account in the measurement of the punishment.

In the case of married women a curious anomaly survived until 1925, after a somewhat sordid case of betting frauds had called it to the attention of the British public.[6] There used to be a rebuttable presumption that a married woman committing a felony (and perhaps a misdemeanour)[1] other than homicide or treason in the presence of her husband did it under coercion from him, and was not criminally responsible. This rule may have come into being because "benefit of clergy" could not be claimed by a woman, so that if a husband and wife were jointly indicted for a felony, the wife would be executed and the husband would escape punishment.[2] This "melancholy" rule of law, as it was called by Sir James Stephen,[3] was at last all too late put to rest by s. 47 of the Criminal Justice Act, 1925. That Act abolished the presumption, but provided that "on a charge against a wife for any offence other than treason or murder it shall be a good defence to prove that the offence was committed in the presence of, and under the coercion of, the husband." So that contrary to the general principles of English law, coercion if proved is still a good defence to a married woman.

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[1] Cp. *Relazione,* i. 98.

[2] 8 C. & P. 616.

[3] *R.* v. *McGrowther,* (1746) Foster, p. 13.

[4] *Ibid.,* p. 14.

[5] *Hist. of Criminal Law,* ii. 107.

[6] *R.* v. *Peel, The Times,* March 8, 1922.

This, though not quite logical, for logically as in practice there may equally be coercion of a woman living with a man or of a child living with its parents, was probably the best practical conclusion for the Legislature. But s. 47 of the Criminal Justice Act has given rise to another anomaly. Coercion is in general a good defence in cases of treason, and it is not necessary that the offence should be committed "in the presence of" the coercer. Apparently now a married woman is in these respects in a less favoured position than other persons. Or perhaps in her case coercion means something less than a threat to life or the use of physical force. It has been suggested[4] that the solution of the puzzle is that Mr. Justice Avory's Committee appointed to consider a change in the old law recommended that the coercion of the husband as a defence to the wife should be abolished, "leaving her free to establish any other defence," but Parliament in its wisdom thought fit to abolish the presumption, but to leave open the defence.

Coercion *per minas* is recognized by the *Progetto* as a good defence,[5] but the person who has uttered the threats is held responsible for the offence. To the present writer, imbued with the contentions of Lord Chief Justice Denman and Sir James Stephen, the harsher English rule seems the better.

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[1] *R.* v. *Torpey*, (1871) 12 Cox 45; *R.* v. *Smith*, (1916) 12 Cr. Ap. R. 42.

[2] Kenny, *Outlines of Criminal Law* (12th ed.), p. 73. But see *Laws of Ine*, p. 57; Laws of Cnut II, pp. 76–7, 1b (*Liebermann*, pp. 114, 362–4), long before benefit of clergy was introduced.

[3] *Op. cit.* ii. 106.

[4] 42 L. Q. R. 542.

[5] Art. 58, capoverso 2. Cp. *Relazione*, i. 98.

THE JAPANESE COMMERCIAL CODE.[1]

[*Contributed by* EDWARD JENKS, ESQ., D.C.L.]

FOR English readers, this first instalment of an authoritative English translation of the Commercial Code of Japan will have a personal as well as a scientific interest. For the translator and annotator is, in the first instance, Professor Kenzo Takayanagi, of the Imperial University of Tokyo, whose friendly presence in England some few years ago, in connexion with the gift made by the British Treasury towards the replacement of the famous library destroyed by the terrible seismic disaster of 1923, they will readily call to mind. The original draftsmanship of Professor Takayanagi has, however, been submitted to the scrutiny, first of the Committee of the League of Nations Association of Japan specially charged with the translation of the Japanese Codes into foreign languages, and, subsequently, so far as the annotations are concerned, of the Legal Adviser to the Japanese Foreign Office (Dr. Baty) and the Legal Adviser to the British Embassy at Tokyo (Mr. Gadsby), members of the committee. So English readers may be assured, not merely of the legal authority of the text, but of the correct translation of the valuable annotations. No one who has experienced the difficulties of translating a legal document into a foreign language will be inclined to under-estimate the value of this elaborate procedure.

Origins and Development of Japanese Law.—The text of the Code is preceded by a valuable historical sketch by Professor Takayanagi, of the origins and development of Japanese law, especially Japanese commercial law. The appearance of a definitely organized commercial class (as distinguished from the local petty traders of the markets and the ports) appears to date back to the late twelfth or early thirteenth century of our era (the Kamakura Period). Two centuries later (Muromachi Period) we find these merchants definitely organized in gilds (*za*), under the protection either of powerful chiefs or of religious houses, and undertaking functions analogous to those of the merchant gilds in Western Europe. A century or so later still there developed specialized *kumi* for individual trades, though whether on the lines of the European craft gilds is not quite clear, and, unfortunately, Professor Takayanagi does not offer us any help towards the vexed and unsolved problem of the genetic relationship between the Merchant Gild and the Craft Gild.

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[1] *The Commercial Code of Japan, Annotated*, vol. i. Published by the Codes Translation Committee, The League of Nations Association of Japan, Tokyo, 1931.

Marine Transport.—By the end of the seventeenth century, we get definite proofs of the existence in Japan of a body of merchants engaged in marine transport, also highly organized; and, despite the premature "free trade" movement of the later sixteenth century, Japan remained, so far as commerce and industry were concerned, a medieval country until 1868, although (as also in Europe) that highly important feature of modern commerce, the negotiable instrument, had made its appearance long before that date. (Professor Takayanagi's account (pp. xix–xxiv) of the development of the Japanese negotiable instrument is of great value.) Again, as in Europe, there were existent in Japan, before the Meiji epoch, certain fragmentary codes (sometimes of unknown origin) dealing with certain aspects of commerce, *e.g.* the *Kaisen-Shikimoku*, dealing with navigation, and the *Kairo-Sho-Hatto*, concerned with sea routes. Upon the basis of these codes, a body of "instance jurisdiction" in what an English lawyer calls "Admiralty Law" had been built up, covering such matters as salvage, charter-parties, general average, and collisions at sea.

Commercial Legislation.—With the Occidental policy of the Meiji government, there followed a rapid development of commercial legislation. In 1890 appeared the Old Commercial Code, based, as to form, on the French *Code de Commerce* of 1807, and, as to substance, mainly upon the German *Handelsgesetzbuch* of 1861; but, owing to various delays which took place before its final enactment, the old Commercial Code as a whole was actually in operation for only about a year (1898–9), being superseded, from June 1, 1899, by the New Code, of part of which the volume under review is a translation. Like its predecessor, the New Code owes much, both of its form and its substance, to French and German sources. In view of the fact that, during the last half-century, the bulk of Japanese foreign commerce has been with the British Empire and the United States of America, this fact is perhaps unfortunate, though the cause of it is obvious. But Japan has made a fine gesture in issuing in the English tongue the first of her projected semi-official Code translations. It is, however, significant that, though no formal alterations in the Code itself have yet been made since its inauguration in 1899, there have been many ordinary statutes which, while professing to leave the Code intact, have filled in many *lacunæ* on modern lines; and it appears that there is a strong movement on foot for a drastic revision of the Code itself, in view of the vast changes in commercial conditions in Japan during the present century.

Doctrine of Judicial Precedent.—One of the most interesting features of the work under review to English lawyers is the fact that, although the doctrine of judicial precedent does not hold in Japan (p. vi), the work in fact contains summaries of many of the decisions of the courts which have been called upon to interpret the provisions of the Code. Not only will these valuable addenda greatly facilitate a study of the Code by English lawyers, but, as is pointed out by the chairman of the committee, Professor Yamada, they will actually enable them to advise with some confidence upon it; for, despite the absence of the doctrine of judicial precedent, we are assured that "the decisions of the higher courts, especially the Supreme Court, have much practical weight and are generally followed in later cases." In other words, the courts in Japan, like the courts in France, Germany, and other European countries, while still repudiating formally the famous English doctrine of judicial precedent, are appreciably approximating towards it. Thus the English doctrine of judicial precedent may be destined in the future to acquire almost, if not quite, as important influence on the evolution of world-law, as the no less famous English doctrine of the Rule of Law.

Status of "Trader."—In the face of these modern tendencies, it is a little startling to discover, from a perusal of Art. 4 of the Japanese Commercial Code, that the status of "trader," though no longer an essential condition for the operation of the law of bankruptcy, is still considered to be something which requires careful definition. Until the translation of the rest of the Code is before us, it will be difficult to realize the full implications of this view. But it is noteworthy that, while, for the rare occasions on which, for purposes of English law, it is necessary to separate trading from other types of transactions (*e.g.* in deciding whether a married woman can be made bankrupt), it is considered sufficient to describe the person in question as "carrying on trade or business"; in the Japanese Code a trader is defined as "a person who on his own behalf engages in commercial transactions as a business." A distinction of this kind is probably inevitable in a system of law which is provided with both a Civil and a Commercial Code; but it would appear that Japanese law makes its distinction rest on a personal rather than on what may be called a circumstantial basis. In other words, it seems to say, not: "This is a commercial transaction, therefore it comes under the Commercial Code," but: "the defendant is a trader, therefore he must be judged by commercial law." It may be, however, that the later portions of the Code will show this to be a mistaken view.

Companies under Japanese Law.—Book II of the Code is concerned with the important and interesting subject of companies; and, inasmuch as the development of company trading in Japan, especially in matters of foreign commerce, appears to have made almost as great strides as it has in England, this book will be of considerable interest to English lawyers. Every company is, by Japanese law, a juristic person (Art. 44); but, apparently, four kinds of companies are recognized by the Code. These are (i) the *Gomei-Kaisha*, which, though not specifically defined, appears to be on much the same lines as an ordinary English partnership, with the important difference that its "articles of incorporation" may, unlike the articles of an ordinary English partnership, affect the rights of outsiders; (ii) the *Goshi-Kaisha* (Art. 104), composed of members with unlimited and members with limited liability; (iii) the *Kabushiki-Kaisha*, the number of whose members must not fall below seven (Art. 119); and (iv) the

Kabushiki-Goshi-Kaisha, composed of members with unlimited liability and shareholders (Art. 235), which is, apparently, a modification of (iii), in which the promoters are subjected to unlimited liability, at any rate for a time (Arts. 236, 243, 244, 246). This classification seems to be a little puzzling; but it is tolerably clear, that the liberty of association accorded by Japanese law is somewhat more restricted than that accorded in the comparable cases by English law. Thus the *Kabushiki-Kaisha*, which corresponds most closely to the ordinary English joint-stock trading company, must (Art. 194), at each distribution of profits, set aside at least one-twentieth of its profits as a reserve, until the reserve reaches one-fourth of its capital; and, when shares are issued above their face value, the excess is for this purpose treated as profits.

Chapter VI of Book II is of special interest to English companies doing business in Japan. These, if they make Japan their chief sphere of operations, are brought, even though formed in a foreign country, within all the requirements of the Japanese Code, as if they were Japanese companies (Art. 258); while, even if a foreign company only has a branch office in Japan, it must "make the same registrations and give the same public notices as a company formed in Japan of the same kind or of that which it most closely resembles" (Art. 255).

We wait with great interest a further instalment of this valuable work.

DEPRECIATION OF CURRENCY UNDER GERMAN LAW AND GERMAN CONFLICT OF LAWS.

[*Contributed by* DR. RUDOLF KAHN, *of Gray's Inn, Barrister-at-Law, Rechtsanwalt, Berlin.*]

Rules under English Law.—Under English law the following rules seem to be well established.

(1) If under a transaction between two parties a sum of money is payable by one party to the other the English courts would decline to admit a claim on account of the fall in the value of sterling occurring in the interval between the transaction and the date when the sum becomes payable.

(2) The English courts have applied the same principle in cases where the transaction between the parties has been in some currency other than sterling, and where the fluctuations in the value of the money concerned have been much greater.[1]

(3) The English courts take the view that a debtor of foreign currency can discharge his debt by the payment of the nominal amount due, notwithstanding that in the interval the value of these sums has been enormously depreciated or even reduced to a practically negligible amount, provided such payment is a full satisfaction according to the substantive law governing the contract.[2]

(4) According to the technical rule of English law the English courts cannot give judgment for a sum of money expressed in any other currency than sterling. For the purpose of converting the debt in foreign currency into sterling for the purpose of the judgment the rate of exchange at the date when such debt ought to have been paid prevails.[3]

(5) From the technical rule under (4) above it follows that a creditor of foreign currency is not to be indemnified for any loss which he may suffer by reason of the depreciation of currency occurring in the interval between the date on which payment ought to have been made and the date on which judgment is given.

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[1] *R. Chesterman's Trust, Mott* v. *Browning*, [1923] 2 Ch. 465; *Anderson* v. *The Equitable Life Assurance Society of the United States*, 42 T.L.R. 123 and 306.

[2] *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade*, 38 T.L.R. 35; *Société des Hôtels du Touquet-Paris-Plage* v. *Cumming*, [1921] 3 K.B. 459, [1922] 1 K.B. (C.A.) 451.

[3] *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166; *in Re British-American Continental Bank Ltd. Goldzieher and Penso's Claim*, [1922] 2 Ch. 589; *Manners* v. *Pearson & Son*, [1898] 1 Ch. 581.

Rules under German Law.—In view of the practical importance of the rules as to currency changes it seems to be a matter of interest to compare the English rules as stated above with the corresponding rules of German law.

I shall deal with the rules of German law in the following order: (1) Effect of depreciation (isolated) of German currency under German law, (*a*) in case of bilateral contracts, (*b*) in case of unilateral contracts; (2) Rules of German law as to foreign currency, reasons for the difference between the English and German rules; (3) Effect of depreciation in addition to default in payment by the debtor occurring after due date for performance under German law; (4) German conflict of laws; (5) Conclusion on broad principles.

Effect of Depreciation (isolated) of German Currency under German Law.—If German law is applicable and fluctuations in the value of German currency occur, the fundamental principle of German law is to the effect that such fluctuations in the value of money are to be disregarded by the German courts. This principle is shortly to be expressed as Mark = Mark, and in the German jurisprudence is described as "nominalism" as opposed to valorism. The foundation of this principle lies as far as legislation is concerned in the German currency legislation which, like the legislations of other countries, fixes a legal tender.[1] It was only due to the enormous and exceptional depreciation of the German mark (inflation) that the German courts, by means of the general clause in § 242 German Civil Code, deviated from this well-established principle of nominalism. § 242 German Civil Code reads as follows:

> The obligor is under an obligation to effect the promised performance in such manner as good faith requires, regard being had to custom.

A summary of the development of the decisions of the German courts in regard to the catastrophic depreciation of the mark may, by way of example, be useful in proving *e contrario* the fundamental principle of nominalism under German law, and it may also show the very exceptional circumstances under which the German courts thought fit to deviate from this principle.

(*a*) In case of bilateral contracts executory on both sides the *Reichsgericht* operated at first with the argument that the complete alteration of the German economic conditions in consequence of the war and the revolution had effected a change which might in certain circumstances go to the root of a contract, so that the performance in the consideration of the parties at the time of the contract might not be identical with the performance possible after such change of conditions.[2] The general clauses of § 242 and also § 157 German Civil Code were held to apply. At this earliest stage the depreciation of the mark was not in the limelight of the judicial decisions. The effect of the application of § 242 was a dissolution of the contract.

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[1] See decision of the *Reichsgericht* in *Entscheidungen des Reichsgerichts in Zivilsachen* (cited hereafter as *R.G.*), vol. 107, p. 88.

[2] See *Reichsgericht* in *R.G.*, vol. 98, p. 18; vol. 99, pp. 115, 259.

The next step in the judicial decisions was to allow a vendor under a contract not only to refuse performance on account of fundamental change of conditions, but also to entitle him to demand an increase of the price agreed upon. The court in fixing an increased price has to consider the interests of both parties. Here, for the first time, the depreciation is recognized as a relevant and material fact.[1] The allowance of an increase in price has not been confined to contracts concluded in times of stable currency, but has been extended to contracts concluded during the period of depreciation, provided that there was a catastrophic depreciation of the mark between the conclusion of the contract and the due date of performance. The *Reichsgericht* always acted in consideration of the special circumstances of the case and of the interests of both parties.[2] In this period the *Reichsgericht* many times referred in its decisions to the principle that contracts have to be kept and that the imminent ruin of one of the parties alone is not sufficient to discharge the contract by impossibility of performance. Instead it was held necessary that the change of conditions between the time of contracting and the due date for performance must be so unexpectedly grave and fundamental as to affect the whole business life of the country.[3]

The third stage in the development was brought about by the speedily progressing depreciation of the mark, and for the first time the depreciation itself of the mark entered into the foreground. It was then expressly recognized that this depreciation in itself may have caused such a material alteration as to go to the root of a contract.[4] A new theory, called the *Aequivalenz* theory, originated in the decisions of the *Reichsgericht* which looked at the relationship in value of performance and counter-performance contemplated by a contract and placed it in comparison with the relationship in value existing at the due time for performance and counter-performance and laid down that there was a presumption that the *Aequivalenz* in the relationship in value should be maintained.[5] If a contract was left executory only on the side of the vendor, *i.e.* if the vendor had received the purchase money in non-depreciated money, the *Aequivalenz* theory did not apply, and the vendor was bound to deliver according to contract.[6]

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[1] See *Reichsgericht* in *R.G.*, vol. 100, p. 129, and in Warneyer's *Jahrbuch der Entscheidungen* (cited hereafter as *Warn. E.*), 1921, No. 65.

[2] See *Reichsgericht* in *R.G.*, vol. 98, p. 18; vol. 99, p. 260; vol. 102, p. 272.

[3] See *Reichsgericht* in *R.G.*, vol. 101, p. 74, and *Juristiche Wochenschrift* (cited hereafter as *J.W.*), 1921, p. 833.

[4] See *Reichsgericht* in "*Das Recht*," *Rundschau für den deutschen Juristenstand* (cited hereafter as *Recht*), 1923, No. 1218.

[5] For details see *Reichsgericht* in *R.G.*, vol. 103, p. 328; vol. 106, p. ii; vol. 106, p. 8; *J.W.*, 1923, p. 984; *Leipziger Zeitschrift für Deutsches Recht* (cited hereafter as *L.Z.*), 1923, columns 646 and 1231.

[6] See *Reichsgericht* in *J.W.*, 1923, p. 457; in *Recht*, 1924, No. 950; in *R.G.*, vol. 107, p. 240.

(*b*) In the case of unilateral contracts, as *e.g.* claims for recovery of money lent, there was no room for the *Aequivalenz* theory, because according to the nature of such contracts there is no counter-performance within the legal meaning. The first decision which gave a general right of revalorization in absence of default by a debtor is the decision mentioned by Dr. Barandon in his evidence in the case of *Anderson* v. *the Equitable Life Assurance Co.* of the United States.[1] It is only to unilateral contracts or perhaps contracts left executory on one side that this decision applies, as in respect of bilateral contracts a remedy had been developed before.[2] It is remarkable that in this very decision the *Reichsgericht* expressly reaffirms the view that the principle Mark = Mark is only to be dispensed with in very exceptional and catastrophic circumstances, such as the depreciation of the mark was, and it is only in such circumstances that the principle of good faith or equity is allowed to interfere with the principle of nominalism as provided for by the German currency legislation.

The above summary shows the great reluctance with which the *Reichsgericht* departed from the principle of nominalism, and it is significant that at the earliest stage the starting-point was not the depreciation of the mark, but the fundamental change of the life of the country. I may add that the uncertainty caused by the application of § 242 German Civil Code led the German government to introduce revalorization legislation, which by certain fixed rules facilitated the task of the German courts. This legislation applies only to the special case of the depreciation of the mark, and it seems to be unimportant for the purpose of this article, which aims at stating the broad principles. It may, however, be mentioned that § 242 German Civil Code still applies to certain transactions, and that by §§ 86, 87 of the *Aufwertungsgesetz*, or Revalorization Law, of July 16, 1925, provisions as to reciprocity and retaliation as against foreign countries and foreign nationals are made.[3] The principle of German law may therefore be stated as follows :

Fluctuations in the value of German currency are to be disregarded by the courts, except in very exceptional and catastrophic circumstances when justice and equity require that regard should be paid to such fluctuations. I may add also that § 242 German Civil Code, on which revalorization is based, is, according to German conceptions, a provision of German substantive law.

Rules of German Law as to Foreign Currency, Reasons for the Difference between the English and German Rules.—Under German law debts (the term " debt " is here not used in the English legal meaning of a liquidated amount of money due, but in the loose sense of " money due " or " demand in money ") expressed in foreign currency are deemed to be proper money debts and on an equal footing with debts expressed in German currency.[1] Therefore the principle of nominalism and the other general rules of German law, as *e.g.* those as to interest payable and as to damages in default of payment[2] apply equally to debts expressed in foreign currency.[3] But, moreover, it is not only the principle of nominalism, but also the general clause of § 242 German Civil Code which apply to debts expressed in a foreign currency just as if they were as debts expressed in German currency, as will be seen under German conflict of laws hereafter.

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[1] 42 T.L.R. 123 and 306. This was the decision of November 28, 1923, reported in *R.G.*, vol. 107, p. 78.

[2] See above.

[3] As to this law see article by Dr. Walther Fischer in *Journal of Comparative Legislation*, Third Series, vol. x, p. 94. Note by Editor.

§ 244 German Civil Code is a special provision as to debts due in foreign currency, and runs as follows:

> If a debt expressed in foreign currency is due to be paid in Germany, payment may be made in German currency, subject to an express provision to the contrary that payment is to be made in foreign currency. The conversion has to take place according to the rate of exchange prevailing at the time of payment in the place of payment.

A similar provision is contained in Art. 37 of the German Bills of Exchange Act of June 3, 1908, as to bills of exchange expressed in foreign currency.

The effect of § 244 is to give the debtor a right to pay in German currency in default of a provision to the contrary. The date for conversion is the time of actual payment.[4] The application of § 244 German Civil Code is further confined to cases where German law is otherwise applicable and under the condition that payment has actually to be effected in Germany.[5] The creditor himself has no right to demand payment in German currency. In point of law the creditor must demand payment in the foreign currency agreed upon, and it is for the debtor to plead before judgment his right of conversion, if any, and judgment would then be given as follows:

> The defendant is ordered to pay to the plaintiff £100, but the right is reserved to the defendant to pay instead an amount in German currency which at the time of payment under the official rate of exchange at the Berlin exchange equals the value of £100.

The debtor cannot plead this right after judgment. The German practice, *i.e.* the judicial decisions, of the *Reichsgericht* take a broader view, inasmuch as they seem to empower a judge to give judgment for an amount expressed in German currency, although neither creditor nor debtor expressly claims conversion.[6] The reason for this practice lies probably in the fact that debts expressed in foreign currency are treated as on an absolutely equal footing with debts expressed in German currency, so that the distinction as to the different currencies seems to be of minor importance.

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[1] See *Reichsgericht* in *R.G.*, vol. 101, p. 313; in *J.W.*, 1920, p. 704; *J.W.*, 1921, p. 22.

[2] See *infra.*

[3] See *Reichsgericht* in *J.W.*, 1924, p. 1368; *J.W.*, 1920, p. 373; *J.W.*, 1925, p. 469; *J.W.*, 1924, p. 174.

[4] See *Reichsgericht* in *R.G.*, vol. 101, p. 312.

[5] See *Reichsgericht* in *Recht*, 1921, No. 1125.

[6] See *Reichsgericht* in *R.G.*, vol. 96, p. 273.

It is undoubted law that German courts are able to give judgment for a sum of money expressed in foreign currency, and have in certain cases done so. It is true that this may create difficulties as to execution, seeing that under ordinary circumstances a *Gerichtsvollzieher* (sheriff or bailiff) is not able to levy execution in the foreign currency. But, on the other hand, a judgment creditor of foreign currency is in a very favourable position, as he may proceed to execute under § 803 German Code of Civil Procedure, which also covers execution on judgments expressed in German currency, and may levy execution until the judgment debt expressed in the foreign currency is satisfied according to the rule of conversion. So the creditor is not bound himself to convert arithmetically the foreign currency into German currency, but the amounts taken or realized by the *Gerichtsvollzieher* in the course of execution are to be converted into the foreign currency according to the official rate of exchange at the date of actual receipt by the *Gerichtsvollzieher*. If the amounts taken by the *Gerichtsvollzieher* should prove to be insufficient for full conversion, further execution follows, until the arithmetical conversion is in order.[1] The result of these provisions is that debts expressed in foreign currency are like debts expressed in German currency subject to the principle of nominalism and to the operation of § 242 German Civil Code under very exceptional circumstances.[2] Judgment may be given for amounts expressed in foreign currency and, for the purpose of conversion into German currency, if such right exists in any case, the actual date of payment and the rate of exchange prevailing at such date in the place of payment are decisive.

In this respect German law differs fundamentally from English law. The English technical rules in question may be traced to the merging effect of English judgments, to the unwillingness of English courts to grant specific performance and to the old forms of action which did not allow actions for debts expressed in foreign currency. The cause of action upon refusal to pay in a foreign currency is for damages and not for debt.[3] The English technical rules, I think, are to some extent the necessary result of the rules relating to damages for detention of debts as English law considers in such cases interest to be the only proper damage,[4] or at the most nominal damages may be recovered.[1] On the other hand, German law permits a creditor as a matter of principle to recover substantial damages in default of payment by the debtor.[2] It may also be mentioned that a defendant in an English action may still pay in the foreign currency agreed upon and depreciated, until judgment, and evade in this way the operation of the English rules of conversion if such payment is deemed satisfaction by the substantive law governing the contract.[3] Finally, it seems that the English rules of conversion would operate in a different way, if an action is brought in England to recover the value of a given sum in foreign currency upon a judgment obtained abroad. The value in such case in sterling money has to be ascertained according to the rate of exchange between the foreign country and England at the date of the foreign judgment.[4] It may also be observed that the English rules are favourable and just as far as the creditor under an obligation expressed in foreign depreciating currency is concerned,[5] but always provided the sterling value remains stable.

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[1] See also § 754 German Code of Civil Procedure.

[2] See *infra*.

[3] Cf. Hill J. in *Richardson* v. *Richardson*, [1927] P. 225 at p. 234. This solves the problem, whether the time of conversion in respect of money due in foreign currency is the date when the money was due or the date of judgment. There are conflicting decisions and *dicta* of first instance. For the former prevailing view: *Uliendahl* v. *Pankhurst, Wright & Co.*, 39 T.L.R. 628; *Peyrac* v. *Wilkinson*, 2 K.B. 166; *Credit General Liegeois' Claim*, 2 Ch. 589; for the latter view: Roche's J. *obiter dictum* in *Di Fernando* v. *Simon*, [1920] 2 K.B. 704 at p. 708, and the decision *Cohn* v. *Boulken*, [1920] 36 T.L.R. 769. As the action is an action for damages, the former view seems to be correct also in principle.

[4] 3 & 4 Will. IV, c. 42, s. 28.

Effect of Depreciation in Addition to Default of Payment by the Debtor occurring after Due Date for Performance under German Law.—The first sentence of § 286 German Civil Code reads as follows : " The debtor has to make good any damages arising through his default to the creditor."

§ 287 German Civil Code : " The debtor during the time of his default is liable for all consequences of any kind of his negligence."

§ 288 German Civil Code : " A debt during the time of default bears interest at 4 per cent. for the year, if the creditor is entitled on any ground to demand a higher rate of interest payment of the higher rate of interest is to be continued. The claim for compensation for additional loss is not excluded."

The term " debtor " within the meaning of §§ 286, 287 German Civil Code is used in a wider sense and denotes an obligor.

From the law it is clear that a creditor may claim damages on account of default of a debtor to perform at the due time, because he has suffered damages through depreciation of currency occurring after the due date for performance by the debtor. These damages, like any other damages, have as a matter of principle to be proved strictly by the creditor.

This right to damages is not be be confused with revalorization proper, because damages must, if proved, be awarded without relief to the debtor for reasons of equity.[6] Reverting to the example of the German catastrophic depreciation of marks, the following development may be observed : At the beginning of the depreciation a creditor of marks was strictly put to his proof of damages in consequence of the principle of nominalism. In time a presumption was established in favour of a creditor residing abroad, that he would at once have converted the amount in marks, if received, into the currency of his own country,[1] and thus dispensing in favour of a creditor residing abroad with strict proof of damages. At this time a creditor residing in Germany was still bound strictly to prove his damages. It was only much later that the same presumption became established in favour of a creditor residing in Germany.[2] Finally it became established that a creditor generally might claim damages arising through default of his debtor and depreciation of German currency intervening without the necessity of strict proof. But a debtor was held to be entitled to displace the presumption by proving that a creditor had not in fact sustained any damages, because he would not have been able to keep the gold-value of the payment, if payment had been made at the due time.[3] It may also be observed that a vendor who had made default to deliver would under § 287 German Civil Code not have been able to get an increase in the price on account of depreciation intervening. But in consequence of the catastrophic depreciation even a vendor in default has been held to be entitled under the *Aequivalenz* theory to an increase of price after deduction of damages for his default, which are due to the creditor.[4]

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[1] See, *e.g.*, *Wildy* v. *Clarkson*, (1795) 6 T.L.R. 304.

[2] See § 286 German Civil Code.

[3] *Cf. Sociéte des Hôtels du Touquet-Paris-Plage* v. *Cumming*, 38 T.L.R. 221.

[4] *Scott* v. *Bevan*, (1831) 2 B. and Ad. 78.

[5] See, *e.g.*, case of *Di Fernando* v. *Simon, Smith & Co.*, [1920] 3 K.B.D. 409, and "*The Volturno*," [1921] 2 A.C. 544.

[6] See *Reichsgericht* in *L.Z.*, 1927, col. 39.

In the case of default of a debtor and intervening depreciation of foreign currency a similar presumption or principles have not been established, but a creditor is put to the actual proof of damages. In one case[5] the *Reichsgericht* required as to French francs actual proof of damages, which was not given in this case, and in another case,[6] also a case of French francs, it considered that sufficient proof of damages had been given.[7]

The German rules relating to damages on account of default by a debtor and intervening depreciation are, according to the German conceptions, " substantive law."

German Conflict of Laws.—The rules relating to the measure and assessment of damages are under English law rules relating to the remedy, and therefore in the nature of adjective law. This involves as a consequence that English courts have to apply the English rules as *lex fori*, even where transactions governed by foreign law and foreign currencies are concerned. This fact has been overlooked by continental critics of English judicial decisions. Therefore in this matter no conflict of laws can arise under English law, and consequently revalorization was permanently refused by the English courts, irrespective of the substantive law applicable. One case appears to be an exception.[1] In that case judgment was for payment in Chervonetz roubles instead of their valueless old Russian roubles. This, in fact, amounted to revalorization. But it seems that this decision must be considered in the light of the evidence tendered, and not as a decision in principle.

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[1] See *Reichsgericht* in *R.G.*, vol. 96, p. 262 ; vol. 98, p. 164 ; vol. 102, p. 60.

[2] See *Reichsgericht* in *R.G.*, vol. 107, p. 212 ; in *Warn. E.*, 1923/24, No. 86.

[3] See *Reichsgericht* in *J.W.*, 1928, p. 2841, No. 29 ; and in *Zeitschrift für Rechtspflege in Bayern*, 1925, p. 150.

[4] See *Reichsgericht* in *R.G.*, vol. 106, p. 422 ; vol. 107, p. 124 ; vol. 109, p. 222.

[5] *Reichsgericht* in *R.G.*, vol. 120, pp. 197, 198.

[6] *R.G.*, vol. 107, pp. 135, 136.

[7] See also *Reichsgericht* in *L.Z.*, 1923, col. 345 ; in *J.W.*, 1923, p. 924 ; and in *J.W.*, 1926, p. 1323, No. 3.

The position is different under German law, as the rules relating to the measure or assessment of damages are considered as substantive law, and therefore the first question for the German courts to decide is as to the law applicable. In this respect a very interesting question of conflict of laws arises, namely as to whether the court must apply the law which upon general principles governs the contract, or, on the other hand, must apply the law of the country in whose currency the obligation is expressed. In other words, whether revalorization rules are to be deemed to be in the nature of currency laws (*währungsrechtlicher Natur*) or whether they are to be deemed to be part of the law which on general grounds governs the contract (*schuldrechtlicher Natur*). Speaking practically, it means, whether German courts are able to revalorize an obligation expressed in Austrian kronen, if the obligation is governed by German law, and if, on the other hand, the Austrian courts do not recognize revalorization which, in fact, they do not recognize. It seems that the *Reichsgericht*, after conflicting decisions, has adopted the view that the rules as to revalorization are part of the law which governs the contract and not part of the laws relating to currency.[2] The weight of judicial authority is as aforesaid to the effect that the rules of revalorization are part of the law otherwise governing the contract.

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[1] *Buerger* v. *New York Life Insurance Co.*, 43 T.L.R. 601.

[2] See *Reichsgericht* in *R.G.*, vol. 107, p. 78; vol. 119, p. 239; vol. 120, p. 70: The plaintiff, a German national, had contracted a life insurance in Vienna before the war with the Austrian agent of a German insurance company. The insurance was expressed in Austrian kronen. In an action for revalorization the *Reichsgericht* held that under the circumstances of the case German law governed the insurance contract and revalorization was granted, although Austrian currency was in question and the Austrian law does not recognize revalorization. Vol. 121, p. 344: A mortgagor owed a mortgagee a debt expressed in German currency for which as security a mortgage was registered in the land registry on real property. The place where the real property is situated was formerly German territory and became Polish by the Peace Treaty. The Polish courts, which under Polish law did not recognize revalorization, in this case ordered the mortgagee to consent to a cancellation of the mortgage against payment of the nominal amount in Polish marks. The mortgagee claimed before the German courts revalorization against the mortgagor in respect of the personal debt as distinct from the charge on the land, and the *Reichsgericht* held that German law applied and that the mortgagee was entitled to revalorization of the personal debt according to German revalorization law, notwithstanding the Polish statutes in question to the contrary. The effect of the Polish currency statutes and of the Polish judgment was held to be confined to the charge and real property situated in Polish territory (as distinct from the personal debt). Vol. 123, p. 134. The decision in *R.G.*, vol. 118, p. 370, is not clearly expressed, and is in conflict with *Reichsgericht* in *R.G.*, vol. 120, p. 277: The facts of this case are similar to those in the decision in vol. 120, p. 70. In question is a debt on a mortgage registered on real property which by the Peace Treaty became part of Polish territory. The plaintiff sued for revalorization in respect of the personal debt due from

Another question is whether the German courts will apply in a given case as to German marks a foreign law which does not recognize revalorization. This refusal to apply the foreign law may be based on the ground that this law conflicts with German *ordre public*, or with the purpose of a German law in the sense of Art. 30, Introductory Law to the German Civil Code. In an earlier case the *Reichsgericht* refused to apply as to German marks Danish law, otherwise applicable, which does not recognize revalorization.[1] But in a later decision the *Reichsgericht* changed its view in a case, where German marks and Czechoslovakian law were concerned. The *Reichsgericht* declared expressly that there could be no objection to another country making its law to suit its own needs, and that, therefore, the refusal of Czechoslovakian law to recognize revalorization cannot be objected to.[2] So in the last-mentioned case the German courts refused revalorization as to German marks by operation of Czechoslovakian law.

In another direction lies the question in regard to the effect of the application of German law as to foreign currencies. In the case in *R.G.*, vol. 120, p. 70, the German courts allowed revalorization of an obligation expressed in Austrian kronen, although the Austrian law does not recognize revalorization. Revalorization, on the other hand, was

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the mortgagor. The court of second instance found: Polish law is to govern the transaction as *lex loci solutionis*, which in this case would not grant revalorization. Accordingly revalorization was refused. The *Reichsgericht* held: revalorization is in its character part of the currency law, and as the debt was expressed in German marks German revalorization law is to be applied. Revalorization granted. And *Reichsgericht* in "*Rechtsprechung in Aufwertungssachen*," 1928, pp. 257, 449, and *Kammergericht* in *J.W.*, 1928, p. 2032.

[1] See *Reichsgericht* in vol. 114, p. 172: This case deals with a mortgage registered on real property which by the Peace Treaty became part of Danish territory. The mortgagor had obtained judgment of a Danish court against the mortgagee ordering the mortgagee to give a receipt for the mortgage money due and to consent to a cancellation of the mortgage charge in the land registry against payment of the nominal amount of paper marks. The plaintiff (mortgagor) then sued before the German courts to enforce the Danish judgment. The *Reichsgericht* held that the Danish judgments refusing revalorization is as well against German *ordre public* as against equity and the purpose of German law. Therefore, execution was refused to the Danish judgment.

[2] See *Reichsgericht* in *R.G.*, vol. 119, p. 259: The plaintiffs claim revalorization of a loan against a Czechoslovakian partnership carrying on business in Czechoslovakia; the loan is expressed in German marks. Czechoslovakian law governed the transaction, which law does not recognize revalorization in the present case. The *Reichsgericht* held that the application of Czechoslovakian law refusing revalorization is not against the German *ordre public* within the meaning of Art. 30 of the Introductory Statute to the German Civil Code. The judgment states expressly that no objection can be taken from the point of view of German law against a foreign country which does not introduce revalorization, because its currency has not suffered such an enormous depreciation. Accordingly revalorization has been refused.

denied by the *Reichsgericht* under § 242 German Civil Code to a creditor of Dutch florins.[1] In these cases the fluctuations of the currencies in question were not held to be so great as to require the operation of the rule of equity under § 242 German Civil Code. Another point is the question of damages on account of default of a debtor and depreciation intervening of a foreign currency, which is dealt with above.

Conclusion as to Broad Principles.—It may be useful to compare the propositions of English law as stated above on broad principles with the German rules of law dealt with. The comparison would show the following result:

(1) The German rules are in principle the same, except that the German courts may admit a claim on account of a catastrophic fall in the value of German currency under the operation of the general clause of equity in § 242 German Civil Code. Whether English courts under like conditions would also develop a doctrine of equity to the same effect is a question of mere speculation.

(2) If German law has to be applied by the German courts, foreign and German currency are treated on the same principles. It is, however, a question of conflict of laws, whether foreign law negating or allowing revalorization has to be applied or whether German law governs the matter.

(3) The German courts under the application of German law take the same view as the English courts, except when there has been a catastrophic depreciation.

(4) German courts are, in the absence of any technical rule, in a position to give judgment for a sum of money expressed in any other currency than marks. The German rules of conversion, if conversion is permissible in any given case, relate to the rate of exchange prevailing at the time of actual payment in the place of payment.

(5) Except in the case of catastrophic depreciation of foreign currency, a creditor of foreign currency is not to be indemnified under German law for any loss which he may suffer by reason of depreciation of currency occurring in the interval between the date on which payment ought to have been made and the date on which judgment is given, provided it is a question entirely of depreciation and not also of default and damages.

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[1] See *Reichsgericht* in *Warn. E.*, 1925, p. 1986, and in *J.W.*, 1926, p. 1323, No. 3, the *Reichsgericht* similarly refused revalorization to a creditor of French francs: The plaintiff, a French firm carrying on business in France, claimed revalorization from the debtor, a German merchant, in respect of the purchase price for goods sold and delivered in the course of commercial transactions. The debt was expressed in French francs. German law governed the transaction. The plaintiff demands revalorization on account of depreciation of French currency intervening since due time for payment. No proof of special damages has been given. The *Reichsgericht* held that the depreciation of French currency in question was not so great as to put the equity clause of German law contained in § 242 German Civil Code into operation. Therefore, revalorization has been refused.

The rule of conversion under § 244 German Civil Code is a rule in favour of a debtor and to be exercised at his option and relates to the rate of exchange at the time of actual payment.

In case of damages for the default of a debtor to pay and depreciation intervening after due date for performance, German law admits a claim on the part of the creditor to be indemnified by way of damages on proof of such damages. Under the German catastrophic depreciation of the mark a presumption as to damages became established. English law, it seems, does not admit as a rule such damages on account of failure in payment, with the exception of a claim to interest. It further appears that the English technical rules of conversion compensate for this absence of a right to damages, provided always the sterling value remains stable. But in principle I think this non-admittance of a right to damages is a material difference between English and German law.

LIABILITY IN DAMAGES UNDER FRENCH ADMINISTRATIVE LAW—IV.

[*Contributed by* PROFESSOR LOUIS TROTABAS, *Nancy.*][1]

The Cumulation of the Liabilities of the Administration and of Officials.— —In regard to administrative liability the jurisprudence of the French *Conseil d'Etat* to which we have devoted our attention in the preceding articles illustrates in a high degree a " continuous creation " if we may apply to a different subject-matter that famous expression. For the *Conseil d'Etat* has been, so to speak, kept on the stretch to ensure by the development of its jurisprudence that equality of sacrifice and that just balance among the persons concerned which the theory of administrative liability seeks to realize. However satisfactory may have been the solutions arrived at as to the liability of the Administration for *fautes de service* or for risks created there still remains something necessary to complete the structure.

The principle itself that there was a division of liability between the officials and the Administration was calculated to give rise to certain difficulties in its application which the *Conseil d'Etat* has had to solve by elaborating a theory of a sort of combination known as the *Cumul des responsabilités de l'Administration et des fonctionnaires*, a phrase, perhaps, not strictly correct but firmly established and accepted by all our writers on the subject.

As matter of principle, it seemed that there could be no question of a cumulation of the liabilities of an administration and of its officials. For, when the liability was objective, it was the Administration alone which was liable, and when it was subjective, we have seen that the theory made everything turn on the distinction between *faute personnelle* which involved the liability of the official, and *faute de service* which involved the liability of the Administration. The one appeared to exclude the other and a cumulation was inconceivable.

Nevertheless, a little reflection showed that this system, seductive and comprehensive as it seemed at the first blush, revealed certain chinks through which the liability might escape, to the loss of the person injured. There were even two possible cases in which it appeared inevitable that the liability should vanish. In the first place, owing to different courts having jurisdiction according as the case was one of *faute personnelle* or of *faute de service*, it was quite conceivable that there might be a case of undoubted damage where the administrative courts, while admitting themselves competent, rejected the claim on the merits because they did not find proof of a *faute de service* and did not consider the case one in which the theory of risk was to be applied. And, if the suit was brought in the courts of common law these courts in their turn might not find that the facts proved indicated *faute personnelle.* No help was to be found in such a case by appealing to the *Tribunal des Conflits* to determine the question of jurisdiction, for there was, in fact, no conflict of jurisdiction. Each court gave a final decision on the merits in the exercise of its sovereign authority and there was no escape from the conclusion that the damage could not be made good and that the loss must fall on the victim.[1]

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[1] Translated by the Editor. The previous articles are in *The Journal of Comparative Legislation*, Third Series, vol. xii, pp. 44 and 213, and vol. xiii, p. 56.

In the second place, and this is a case which is more apt to occur and therefore likely to cause more serious trouble, there is no guarantee that a plaintiff who obtains judgment against an offender on the ground of his *faute personnelle* will recover the damages which are awarded to him. In practice one may be sure that the victim of an injury who has obtained judgment against the Administration will obtain his reparation, for, in spite of the theoretical difficulty about enforcing against the Administration the execution of a judgment of the courts, the Administration does in point of fact always pay the damages for which it is found liable. There are practically no limits to the expenditure which it can incur, and, however large the amount of the damages may be, the government is always able to pay them. It is not for nothing that we say "*L'Etat est honnête homme.*" But when there is *faute personnelle* the situation is by no means the same. There are certain systems of suretyships for guaranteeing the State against losses caused to it by its financial officials, but no such guarantee exists for the protection of the public. The victim of the injury has always to face the risk of the official becoming insolvent, and the greater the amount of the damage the more formidable does this risk become. Seeing that the whole theory of administrative responsibility is directed to secure equality of sacrifice among the citizens or to restore that equality, is it just that while the victim of a *fait de service* has the certainty of obtaining reparation, the victim of a *faute personnelle,* which is by definition a more serious matter, should, on the other hand, be exposed, almost of necessity, to the risk of finding it impossible to make the official pay the damages notwithstanding that judgment has gone against him? Must not this possible breakdown of administrative liability, in the broad sense of that term, be prevented by some extension of those general principles of liability which we have explained earlier?

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[1] This was the situation in the famous case of the *Iris.* At the time of the Crimean War this vessel had been insured with an insurance company against maritime risks and with the State against war risks. The vessel was lost on the shores of the Crimea and its owner in the first instance sued the insurance company. The civil court dismissed the action on the ground that the loss was caused by a war risk (*Rouen,* 2 *avril* 1856, *D.* 1856. 2. 221). He then brought his action against the State, but this claim was rejected on the ground that the accident was due to a maritime risk (*Conseil d'Etat,* 23 *juillet* 1857, *Houlbrèque, Recueil Lebon,* p. 570).

It is to remedy this defect that the theory of " cumulation " which we have now to explain has been elaborated. This theory does not, as we shall see, lay down any new basis of liability. What it does is to bring in a correction in order to make sure that in actual practice the administrative liability shall be real. And this leads us to note at the outset, in order to avoid any confusion, that the theory of cumulation does not imply, as the term might suggest, that there is in any case a double reparation of the loss. It is more true to say that the theory allows an interpenetration of the two liabilities in such a way as to make it certain that the victim shall obtain reparation. These preliminary explanations enable us to reduce the theory of cumulation to the following concrete question. Does the qualification of the fault as *faute personnelle* imply that liability for it lies definitely and exclusively on the offender or, on the other hand, is it allowable to admit in the case of an act which causes damage that the *faute personnelle* which has caused it does not exclude the liability of the Administration side by side with the liability of the agent ? [1] The jurisprudence during the last twenty years has answered this question by admitting the possibility of a juxtaposition of the two liabilities. At the same time, it takes care to make it clear that the total amount of damages which the victim can receive shall never exceed the loss which he has sustained. Such is the meaning and scope of what is called the theory of cumulation. But, the principle once established, the courts have had to develop it in their decisions. They have had to determine on the one hand in what types of cases the new theory was to be applied—may any kind of fault on the part of an official involve cumulation ? is the Administration never free from liability ?—and, on the other hand, what precautions are necessary to prevent the damages being paid twice over ? The decisions settling these points which we are about to examine will enable us to clear up the exact nature of administrative liability as it is affected by the theory of *cumul* and to show in the light of the most recent cases what is the contribution made by these new rules to the general theory of liability.

Application of the Double Liability of the Agent and of the Administration.—It was in 1909 that the *Conseil d'Etat*, with the direct encouragement of the writers in this field, admitted for the first time that a person who had suffered injury by a personal act of an official might have simultaneously or concurrently two independent actions, one before the courts of common law against the offender, and the other in the administrative courts against the Administration.[2]

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[1] We may remark in passing that the theory of cumulation works only one way. It imposes liability on the Administration to make good damage caused by the *faute personnelle* of an official, but no question can arise as to whether an official whose act has not been held to be a *fait personnel* ought to assume liability in whole or in part for a *faute de service*.

[2] *Conseil d'Etat*, 12 *février* 1909, *Cie. Commerciale de Colonisation du Congo, Recueil Lebon*, p. 153. See the same formula in *Conseil d'Etat*, 25 *juin* 1909, *Carretier, D.* 1911. 5. 56.

In the cases in which this was decided it was pointed out—to employ the precise terms which the *Conseil d'Etat* uses in its most recent judgments—that the fact of an accident having been caused by an act of a personal character so that an action of damages lay in the courts of common law " could not deprive the victim or his representatives of the right to bring an action against the State as responsible for the proper working of the branch of the public service which was concerned to make good the loss sustained." [1]

The practical effect of this is to guarantee the victim of the injury against the risk of the agent being insolvent, because if he sues the Administration he can make sure of receiving his reparation. But how are we to understand this formula of *cumul* ? Do the judgments indicate that it is of general application or is it to be restricted to special types of cases in which the circumstances call for exceptional treatment ? The question presents itself at the outset whether the nature of the fault creates a distinction. It may be asked whether this cumulation, which is admissible when we are dealing with a fault for which its author has a civil liability only, is to be admitted likewise when we are dealing with a fault which renders its author liable criminally. A wrongful act of this latter kind is essentially personal, and one may doubt whether it can change its nature and become a civil liability resting on the Administration, seeing that, according to the general principles of French law, and more particularly according to the theory of " public functions," we are not entitled to hold the Administration liable for the acts of its agents as being a *commettant* in the sense of Article 1384 of the Civil Code.[2]

Notwithstanding this, the jurisprudence has never hesitated. It takes into consideration no doubt that criminal fault by its personal character attaches to the man and not to the official, but it observes that if the victim has sustained an injury, and this injury was occasioned, more or less directly, by the working of a public service, so that we can regard this service as having conditioned the perpetration of the crime or delict, what must be said is " the fault is perhaps detachable from the service—that is a question for the courts of common law—but the service is not detachable from the fault." [3]

Accordingly, we shall see that the theory of cumulation is applied in cases of crimes as well as in the less difficult cases where the wrongdoer has only a civil liability.[1]

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[1] *Conseil d'Etat*, 9 *nov.* 1928, *Rapin, D.* 1929. 3. 1.

[2] This conclusion follows directly from the fact that the theory of administrative liability is constructed according to its own rules, as we have seen above (Third Series, vol. xii, pp. 213 *seq.*). It is, moreover, firmly established by the jurisprudence, particularly in cases where there was criminal liability on the part of the agents (*Trib. des Conflits*, 26 *mai* 1924, *Lemetti, D.H.* 1924, 564, and M. Hauriou, *Notes d'Arrêts*, vol. i, p. 505 ; *Cass. civ.*, 30 *déc.* 1930, *Sirey*, 1931. 1. 217, with the note by Roger Bonnard).

[3] *Conclusions*, Léon Blum on *Conseil d'Etat*, 26 *juillet* 1918, *Lemonnier, D.* 1918. 3. 9.

A more delicate question arises in regard to the liability of the Administration. Must it suffer from this theory of cumulation in every case in which the victim chooses to exercise his recourse against the State, or must there be some particular ground or liability independent of the *faute personnelle* ? This is the fundamental problem of administrative liability as affected by this theory of *cumul*. The first decisions on the point rendered in 1909 were expressed in very general language and contained no clear statement on this matter. The *Conseil d'Etat* seems at the outset to have pushed the principle which it laid down to its extreme limits and not to have felt it necessary to make cumulation conditional on the discovery of some precise ground on which the liability of the Administration might be based. In a case where damage had been caused to a colonial company by certain officials who by their personal attitude had interfered with the recruiting of native labour for the company, our administrative High Court gives this answer to the State which is seeking to shield itself behind the personal liability of its agents. "Even if we admit that these acts constituted *fautes personnelles*, they were none the less acts done by an agent of the State in the exercise of his functions."[2]

The result is that the liability of the Administration seems to flow *ipso facto* from the *faute personnelle* of the agent without more, and that it extends accordingly to the whole of the damage suffered. In this primitive statement of the rule there is no suggestion of a division of liability ; the liability is one and indivisible. It is only the method of enforcing it which is double owing to the fact that the victim has a choice between suing the Administration in the administrative courts or suing the wrongdoer in the court of common law.

But, before long, the *Conseil d'Etat* felt the need of subjecting its new principles to a severe scrutiny. They had to be made to fit into the accepted theories of administrative liability, and these rest, as we have seen, on the distinction and the traditional opposition between *faute de service* and *faute personnelle*. And, presently, without throwing overboard the original idea of *cumul*, the *Conseil d'Etat* defines its position.

Faute personnelle, according to the *Conseil d'Etat*, does not of necessity exclude a *faute de service* ; the injury may be caused by the juxtaposition of these two faults. It is precisely in such cases that we may admit the theory of *cumul*. The Administration, finding itself bound by reason of the *faute de service* proved against it, must assume the whole liability for the damage caused by a personal act. *E.g.* a person was jostled by an employee of the post office so violently as to be thrown down and to break his leg. This was clearly a *faute personnelle.* But the *Conseil d'Etat* pointed out that this accident took place when the victim was trying to leave the post office by a door reserved for the staff, the public door having been closed before the regular time. In this premature closing of the door the court found proof of "*un mauvais fonctionnement du service public*," that is, of a *faute de service* upon which it expressly bases the liability of the Administration.[1]

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[1] See, for a particularly clear example, *Conseil d'Etat*, 14 *nov.* 1919, *Lhuillier, Recueil Lebon*, p. 819. In that case a soldier quartered in a village, when drunk, killed the son of the Lhuillier couple with whom he was lodging. He was condemned to death for intentional homicide by the *Conseil de Guerre*, but the judgment admitted the action of civil liability by the parents against the State.

[2] *Conseil d'Etat*, 12 *février* 1909, *Recueil Lebon*, p. 153, cited above.

Again, a soldier in quarters, in attempting to unscrew a German bomb brought from the trenches, caused an explosion by which two civilians were killed. Here, too, the *Conseil d'Etat* found the State liable, "considering that in the circumstances stated above, and whatever may have been the personal liability of the non-commissioned officer who caused the explosion, the accident must be regarded as the consequence of a *faute du service public* of such a nature as to make the State liable in damages to third parties."[2] And, lastly, to come to the best known judgment on this point, the mayor of a commune in the south of France had organized on the River Tarn a duck-shooting competition under such conditions that walkers on the opposite bank were not out of range of stray shots. A person was struck and wounded in this way, and the *Conseil d'Etat* held that the commune was liable. The judgment ran: "The fact that the accident in this case was the result of a personal act of such a character as to involve the liability of the agent, and even the fact that the agent has actually been found liable, cannot deprive the person injured of his right to bring a direct action against the public authority concerned to recover reparation for the loss which he has sustained. It is the duty of the administrative court to find the public authority liable if it considers that there has been such a *faute de service* as to entail this liability." And finding in this case that "the municipal authority whose business it was to secure the safety of the public roads had been guilty of a grave fault, the court holds this authority liable to make good the entire damage notwithstanding that the mayor has been held personally liable by the court of common law."[3]

What will be the consequences of this train of decisions? By basing the liability of the Administration directly upon the idea of *faute de service* the *Conseil d'Etat* begins deliberately to restrict the application of the new theory. The laying down of this subjective basis of liability restricts the application of the theory in two respects. In the first place, the mere mention of *faute de service* involves the consequence that the theory of *cumul* is not to come into application unless a *faute de service* exists. If no such fault can be established, the victim of the injury will, as formerly, have no one who can be made liable, except a public official, and he may be insolvent. And the cases after 1922 show us that this is

[1] *Conseil d'Etat*, 3 *février* 1911, *Anguet*, *D.* 1913. 3. 26, and M. Hauriou, *Notes d'Arrêts*, vol. i, p. 627.

[2] *Conseil d'Etat*, 15 *mars* 1918, *Beaudelet*, *D.* 1920. 3. 1.

[3] *Conseil d'Etat*, 26 *juillet* 1918, *Lemonnier*, *D.* 1918. 3. 9, and the very important *conclusions* of M. Léon Blum.

what happens. We find, for example, that the death of a person assassinated by Chinese labourers employed by the British Army cannot involve the liability of the French Government (in this case substituted for the British Government) because no fault of a certain gravity has been proved on the part of the public service.[1]

In the second place, seeing that the liability of the Administration depends on fault, it must result logically that the extent of the liability is measured by this fault. Instead of the liberal decisions of the first period finding the Administration liable to make good the entire loss, we get inevitably a line of decisions limiting the liability of the Administration to such a proportion of the damage suffered as corresponds to the fault proved against it. We see the idea emerging as early as 1914 in the case of *Babouet* where the *Conseil d'Etat* foresees the possibility " of limiting, if necessary, the liability of the State to guaranteeing payment of the whole or a part of the damages for which the actual offender has been found liable." [2]

If the cases had continued to support this principle, the practical effect of the theory of *cumul* would have been seriously reduced. But this restrictive movement, which was perhaps necessary in order better to find the measure of the new principles, was not of long duration. As early as 1918, in the case of *Lemonnier*, above cited, the *Conseil d'Etat* absolutely abandons the suggestion made in *Babouet's* case and makes the Administration liable for all the damages. Since then its decisions have never varied on this point. But, more than that, in regard to the idea itself of *faute de service* the *Conseil d'Etat* in its latest decisions shows itself less exacting than it was in 1922. Thus, in the case of *Bodson* decided in 1926, arising out of a motor accident, although there was to start with a *faute personnelle*, the court held the State liable for a *faute de service*, which consisted, according to the terms of the judgment, merely in the fact that a driver was a public servant acting in the discharge of his functions.[3]

Is not this equivalent to saying that the *faute de service* results simply from the fact that an agent of the public commits a *faute personnelle* and that there is no necessity, in order to make the State liable, to prove some fact distinct and separable side by side with the *faute personnelle* ? [4]

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[1] *Conseil d'Etat*, 19 *mai* 1922, *Dourdent*. See also *Conseil d'Etat*, 23 *juin* 1922, *Gaspard*, both reported in M. Hauriou, *Notes d'Arrêts*, vol. i, p. 654.

[2] *Conseil d'Etat*, 16 *juillet* 1914, *Babouet*, *D*. 1920. 3. 1.

[3] *Conseil d'Etat*, 26 *déc*. 1926, *Bodson* in M. Hauriou, *Notes d'Arrêts*, vol. i, p. 658.

[4] Careful reading of the decisions in the cases of *Dourdent* and *Gaspard* in 1922, cited above, which have been considered as severely restricting the application of the theory of *cumul* (see especially the *dissertation* by M. Hauriou, cited above) shows that these judgments are not perhaps so strict as they might appear at first sight. As a matter of fact, the *Conseil d'Etat*, after having found that no *faute de service* had been proved, adds : " Considering that no fault imputable to an official of the State has been established, the plaintiff is not entitled to maintain that the Ministry of War in the decision under review was wrong in refusing to find the State liable." From which one may perhaps logically infer that in 1922, as formerly, the *faute personnelle* of the agent, if duly proved, would have been enough to make the State liable.

And, since that time, the expression *faute personnelle* disappears from the decisions, and the latest judgments are put in the form employed in 1909. Thus, in a case of injury caused owing to the fault of the pilot by a military aeroplane which crashed during a flight in the course of the service, the *Conseil d'Etat* condemns the State simply because it is "responsible for the carrying out of the service in question" without seeking for any particular basis for this liability.[1]

In the present state of this movement in the jurisprudence, how are we to construct to-day the theory of administrative liability in cases of *cumul*? One point, it may be laid down to start with, is definitely settled. This is that there can be no question of making the Administration liable for a *faute personnelle* of its agent on the ground that the State is liable as a *commettant* in the sense of Article 1384 of the Civil Code. We have already seen that according to the accepted principles of administrative law the State is not a *commettant* and its officials are not *préposés*. Administrative law does not admit these ideas.[2]

There are decisions which prove clearly that the liability of the State in cases of *cumul* is altogether foreign to these considerations. We find the *Conseil d'Etat* finding an Administration liable for an act imputable to a tenant of a booth in a fair who cannot be regarded as the servant or *préposé* of the Administration, and finding the State liable for a crime committed by escaped convicts whom one can hardly look upon as officials.[3]

In the second place, the latest judgments teach us that the theory of *cumul* is now less closely bound up with the theory of *faute de service* than it used to be. We must not say that no such connexion exists any longer, for the *Conseil d'Etat* has never repudiated it in express terms, and its jurisprudence is too supple to be tied down in a strict manner. But it is certain that the *Conseil d'Etat*, by going back to the liberal formulas employed in 1909 and 1918, is tending towards the conception in the matter of *cumul* of a kind of liability for the *collection* of the damage. This cannot have any other legal basis than that of a presumption of fault on the part of the Administration, arising from the very fact of the fault of the agent, unless we base this responsibility on the theory of liability for risk created. And this is what the writers on the subject declared after the *Lemonnier* case.[4]

But we must not forget that this development in the jurisprudence is not a mere affirmation of objective liability for risk, because it always presupposes, as the basis of this liability, a personal fault on the part of an official which by the application of the theory of *cumul* is, so to speak, endorsed by the Administration.

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[1] *Conseil d'Etat*, 9 *nov.* 1928, *Rapin*, *D.* 1929. 3. 1.

[2] See *supra*, Third Series, vol. xii, pp. 214 and 218. We leave out of account here the very special system of State liability for public teachers laid down in Art. 1384, *al.* 8. This is one of those exceptions which prove the rule.

[3] *Conseil d'Etat*, 23 *juin* 1916, *Thévenet* in *Lebon*, p. 244, and 4 *janvier* 1918. *Sinais*, *D.* 1920. 3. 1. These are the cases, the authority of which was partially shaken by the decisions of 1922 referred to above.

[4] See especially the *dissertation* of M. Hauriou under this case in his *Notes d'Arrêts*, vol. i, p. 648, and his *Précis de Droit Administratif*, 11th ed., 1927, p. 328, note 1.

To conclude, it appears that the cases as to *cumul* do not constitute a separate page in the theory of administrative liability. They fall perfectly well within its general scheme. They confirm the settled rules on the subject in this sense that administrative liability remains in principle subjective and depends on the existence of a fault. But they show that an objective element (presumption of fault or liability for risk) is now permanently at the disposal of the *Conseil d'Etat.* This enables it to hold the Administration liable when this appears to be necessary, either directly, as being liable for the risk created,[1] or indirectly, as endorsing the liability of the agent.

This second hypothesis, which is that of *cumul*, without extending the amount of the liability, enables the victim to be sure of getting his reparation. If the theory of *cumul* has brought anything new into the theory of responsibility of the Administration, it is only in one point : it tends to bring the liability of the Administration into the front rank as being the ordinary rule, and by a subtle process to throw the liability of the agent into the second rank as being something exceptional, though originally it was his liability which was the normal one.[2]

Precautions taken to avoid the cumulation of Indemnities.—We have seen that the courts in applying the theory of *cumul* had to prevent this theory, which was necessary to ensure in practice the reparation and the loss sustained, having the result of enabling the victim to get paid twice over. How has the *Conseil d'Etat* contrived to formulate the liability of the agent and that of the Administration in cases where it admits *cumul* without sacrificing the principle of a single indemnity ?[3]

The *Conseil d'Etat* seems to have sought the solution of this problem first by laying down the principle of complementary indemnities, which is what is generally called the system of guarantee,[4] of which the case of *Babouet*, above cited, is an illustration. This case belongs to the period in which the *Conseil d'Etat* brought the conception of *faute de service* into the theory of *cumul* and drew the consequence that the liability of the Administration must be measured by this fault, and therefore might be less than the whole of the loss sustained, and might be limited to guaranteeing a part only of the amount of damages for which the offender was found liable. But this view of the matter was no longer tenable after the *Conseil d'Etat*, in the case of *Lemonnier* in 1918, had gone back to the formula of *full* reparation by the Administration of the loss suffered. It is in this state of matters that we have to inquire how the *Conseil d'Etat* prevents a double payment, and, while adopting cumulation of liabilities, prevents cumulation of indemnities. It arrives at this result by a double process. In the first place, by a process of judicial policy; it lays down rules which are to serve as directions for the judges to follow. It provides expressly that in all these cases of *cumul* the two independent actions and the two autonomous jurisdictions have to secure by empirical means that the whole damages shall be paid, but no more than the whole damages.[1] This means in practice that the court before which the question comes in the second place must take account of the decision given by the courts of the other jurisdiction or of the proceedings pending in those courts. It is its business to inquire if the other judge intended to award damages for the whole or only for a part of the amount sustained. It must, in short, in the exercise of its sovereign authority to appreciate the facts, manage to co-ordinate the several judgments as to the same matter in such a manner as not to add a new indemnity to that which has been judicially decided to be sufficient. So far as this goes the process consists only in fixing certain guiding rules.

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[1] This is on the theory of liability for risk explained in our third article, Third Series, vol. xiii, pp. 56 *seq.*

[2] This is explained very clearly by M. Léon Blum in 1918 in his *conclusions* on the case of *Lemonnier*, above cited.

[3] This point has been specially studied in the article by M. A. Fliniaux, *Le cumul de la responsabilité de l'agent et de la responsabilité de la personne morale administrative* in *Revue du Droit Public*, vol. xxxviii, pp. 333 *seq.*

[4] See, especially, *P. Duez, La Responsabilité de la Puissance Publique*, p. 166.

But this is not enough. It is necessary to find some legal ground to sanction this empirical process. The *Conseil d'Etat* has found this ground in the principle of *subrogation*. Since it is admitted that the Administration must secure the reparation of the whole of the loss, and since we know from the directions or guiding rules just mentioned that the amount of this loss will be estimated in a joint manner by the two courts, it is clear that the Administration which is found liable pays cumulatively both for its own fault or for the risk for which it assumes liability, and also for the fault of the official. This is fortunate for the victim of the injury, who will be compensated in full by the Administration, but it is regrettable for the public finances which in this way assume the burden of paying for the damage caused by an agent who, after all, may not be insolvent. This is where the *Conseil d'Etat* falls back on the principle of subrogation. In the *Lemonnier* case, after having condemned the *commune* to make good the whole of the loss, for the amount of which it accepted the figure already arrived at by the courts of common law in accordance with the directions mentioned above, the *Conseil d'Etat* adds: "The *commune* shall pay to the consorts L. an indemnity of 12,000 francs with the reservation that payment of this sum shall be subject to the condition that the consorts shall subrogate the *commune* in all their rights to any awards of damages which have been made or may be made by the courts of common law in their favour against the mayor personally in respect of the same accident."[2] And we find this formula repeated without substantial change in all the subsequent judgments.[1] This formula of subrogation adopted by the *Conseil d'Etat* means in effect that if the party injured has a choice of remedies, and even if he has the possibility of two actions, he can take no advantage except from the judgment against the Administration which will make good his loss. And the Administration, in its turn, obtains from the administrative court the possibility of reimbursing itself by claiming against the official in fault if judgment has been pronounced against him. The formulas of *contribution* and *obligation to pay debts*, familiar to us in the civil law, and applied particularly in the fiscal law in the relations between the registry department and the persons liable to it, are here in a manner transposed. Just as we say there that all the persons liable to be sued by the department are subject to the " obligation to pay the taxes demanded " and that there is " contribution to the taxes " in the relations between the parties so that anyone who has paid can recover against the others, so here we can say as to *cumul* that there is for the benefit of the victim of the injury an *obligation* to pay reparation which lies both upon the Administration and the offender, and that, for the benefit of the Administration, there is *contribution* by the official in fault.[2]

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[1] This point is brought out very clearly at the end of the *conclusions* above cited by M. Léon Blum under the case of *Lemonnier*.

[2] See *D.* 1918. 3. 9.

But this kind of action in recourse which is admitted here against the offending official is attended, precisely because we are concerned with a public official, with certain difficulties. We cannot admit here without modification the civil law rules as to contribution. These difficulties arise from the principle which is fundamental in our administrative law of the irresponsibility of the official towards the State.[3]

This principle remains intact, for the *Conseil d'Etat* has by no means shaken it by its decisions admitting subrogation. Indeed, the very fact that there is subrogation implies that the *Conseil d'Etat* does not admit that the Administration has a direct action against the offending official. It is to take action not in its own name but in that of the victim in whose rights it is subrogated. But can we admit that the State or an Administration can in this easy way turn round against its agent to enforce for its own advantage a judgment pronounced against him ?

We must not shut our eyes to the fact that this formula of subrogation which saves the principle of the irresponsibility of the official *vis-à-vis* of the State seriously compromises the security of the public finances. The possibility of a recourse by the Administration against an offending official who is solvent instead of being a matter of right becomes, in reality, extremely uncertain. It presupposes of necessity that the person injured has first brought an action against the official in the courts of common law, for, as we have seen, the Administration is subrogated only in the rights which may result to the victim from a judgment by these courts. Now, it is more than doubtful whether the victim of a personal fault, in the position in which the theory of *cumul* now stands, will bring an action against the official. It is much more simple for him to address himself directly and solely to the Administrative courts in order to get a judgment against the Administration. The possibility of subrogation depends entirely on the private initiative of the party which may probably be wanting. And, on the other hand, even admitting that this initiative has been taken and that a judgment has been pronounced in favour of the victim against the agent personally liable, it is still not certain that the Administration can take advantage of it. Considering the relations which exist between the Administration and its agent, and, in view of the administrative policy which governs them, it is not certain, or even desirable, that the State should turn round against one of its agents in order for its own advantage to obtain execution of a judgment obtained by a member of the public. When all is said, the idea of subrogation appears to us to possess only one virtue, and that a negative one. This is that it prevents the citizen who is the victim of the injury from executing against the offender the judgment which he has obtained. In that way it gives a most effective sanction to the principle of non-cumulation of indemnities. But, practically speaking, it has no positive virtue as far as the advantage of the Administration is concerned, for the Administration will hardly be able to use it by exercising a recourse against the agent and recovering, in this way, the whole or a part of the indemnity which it has had to pay for his personal fault.

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[1] See especially *Conseil d'Etat*, 9 *nov.* 1928, *Rapin*, above cited, in *D.* 1929. 3. 1.

[2] See, on these different points, E. Pilon, *Principes et Technique des Droits d'Enregistrement*, vol. 1, 1929, nos. 905 *seq.*

[3] See on this point our first article, Third Series, vol. xii, p. 50, and specially *Conseil d'Etat*, 28 *mars* 1924, *Poursines*, *D.* 24. 3. 49.

These final observations confirm the conclusions already drawn from the theory of *cumul* which have permitted us to pass in review in its broad features the theory of administrative liability in the French law. In concluding this study we may remark that this theory, full of fine distinctions and extremely supple as it is, is dominated to-day by one very broad principle, namely the liability of the service. Whether this liability is based on the fault of the Administration itself, or whether it assumes the shape of an insurance in favour of the public, we find that, thanks to the principles of liability for risk and of cumulation of liability, the liability of the Administration manifests itself as of a very wide character indeed, though subject to the reservation of the partial limitations on it implied in the theory of *acte de gouvernement* and of *acte législatif*. This liability is the sanction of administrative power and is itself an indication of its force, for in administrative law, as in constitutional law, and in every other branch, responsibility is the mark and the price of power.

Appendix.—Summary Notions of Administrative Procedure and of Costs in Actions of Damages against the Administration.—The preceding articles have shown the great liberality of the system of administrative liability in French law. But in order to understand how French administrative law affords an easy remedy to persons who have suffered damage by the activity of a government department it is necessary also to know something of the actual procedure in suits of this kind. If the procedure in such actions of damages were complicated and expensive, there might be a theoretical protection of the rights to reparation, but there would be a risk of this protection being ineffectual. On the other hand, the remedies will be obviously facilitated by a kindly, simple and inexpensive procedure.

As we have seen, the organization of justice in France is based on the principle of the distinction between courts of two classes: the judicial tribunals, which we have called in these articles the courts of common law, and the administrative tribunals. If we leave out the cases of personal liability of officials, which, as has been seen, falls within the competence of the courts of common law, and we are the more entitled to do this because the theory of *cumul* permits almost always a juxtaposition of the liability of the Administration with the personal liability of the official, we may say that, speaking broadly, cases of administrative liability belong to the administrative courts. It is, accordingly, the rules concerning these courts to which our explanation will be confined.

Procedure before the Conseils de Préfecture.—The administrative court as a general rule is the *Conseil d'Etat*, that is to say that the bulk of the cases of this kind are brought for the first and last time before the *Conseil d'Etat*. At the same time, in the organization of French administrative courts we find certain judges with special powers to deal with certain categories of cases. The *Conseils de Préfecture* notably have competence over the whole field of public works, and can deal therefore with actions of damages for injuries resulting from public works. And it is further to be noticed that in cases of this class the *Conseil de Préfecture* is only the court of first instance: its decisions can always be carried to appeal before the *Conseil d'Etat*. It is, however, no less necessary to sketch briefly the procedure in these courts.

There is not in French law any code of administrative procedure. Nevertheless, so far as the *Conseils de Préfecture* are concerned, there is a law of July 22, 1889, which goes into great detail and is completed and amended by a decree of September 26, 1926. These lay down the details of this procedure. It is characterized by the following features: it is *written* in contrast with the procedure of the ordinary courts, which is oral; it is *inquisitorial*—that is to say, conducted by the judge in contrast to the procedure of the ordinary courts conducted by the parties themselves; it is *free*—that is to say, the parties may choose their representatives without being obliged to have recourse to those legal bodies which enjoy a monopoly in the other courts, such as the *avoués* and the *avocats*, which is again in contrast with the procedure of the courts of common law. These characteristics, as will be divined, carry with them as a direct consequence a great simplicity and the reduction of costs to the minimum.

As regards the formalities, the party who wishes to exercise his recourse before a *Conseil de Préfecture* has only to file a petition on stamped paper (3 francs 60) in the office of the *Conseil de Préfecture*.[1]

The petition may be drawn up and signed by the petitioner himself, but he has the right, if he prefers it, to have it drawn up by a more competent person.[1]

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[1] This petition must be accompanied by as many certified copies as there are parties to the suit.

Side by side with this very liberal procedure the law allows the parties, if they prefer to do so, to proceed by way of summons as in a civil action. But this practice has the inconvenience of entailing the expense of a summons, and, as it presents no advantage, it is naturally little used. In any case, it is the business of the clerk of court, as soon as the papers are filed, to make the necessary notifications. The *Conseil* entrusts the study of the papers to one of its members as *rapporteur*, and it is on his motion that the *Conseil* in charge of the procedure takes all the preliminary decisions—notifications, admission of parties, production of documents, etc. The parties reply by written memoirs and observations, and when the case comes to trial they can offer, by themselves or by their representatives, oral arguments which follow on the report read by the *rapporteur* at the hearing. After the *conclusions* which the *Commissaire du Gouvernement* is obliged to give the *Conseil* pronounces its decision.

The only complication in practice which may occur in this procedure is the possibility of a reference to experts. In point of fact the discussions, particularly in these cases of liability in damages, may involve the appreciation, often of a delicate kind, of technical facts, either to determine the liability or to arrive at an exact estimate of the damages. Accordingly, reference to experts is very common. The expert may be nominated directly by the *Conseil de Préfecture*, but, as a rule, there is a triple nomination, each of the parties naming his expert and the *Conseil* nominating a third.

We see that in this procedure there are no documents involving costs : there is no document on which even court fees have to be paid. The costs, which fall naturally on the losing party, arise almost exclusively from the expenses of references to experts, and these are taxed by the President of the *Conseil de Préfecture*.

Procedure and Costs before the Conseil d'Etat.—Before the *Conseil d'Etat* we find an administrative procedure of the same general character as that which has been explained, with this difference, however, that there is not the same freedom as to representation. The members of the body known as *Avocats au Conseil d'Etat et à la Cour de Cassation* are alone entitled in principle to represent the parties before these courts as well as before the *Tribunal des Conflits*. They perform the rôles both of *avocat* and *avoué*, and their intervention will of course involve certain costs.

The *Conseil d'Etat* may, as we have seen, be seized of a case either directly or on appeal from a decision of the *Conseil de Préfecture*. The procedure in the two cases is, however, the same.[2]

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[1] In this case, if the petitioner chooses an *avocat*, as is frequently the case, the *avocat* is entitled to sign the petition. If the party chooses a representative who is not an *avocat*, the petitioner must sign the petition himself or give a special authority to do so.

[2] The following information as to the details of costs before the *Conseil d'Etat* has been kindly supplied to me by Maître Jacques Bosviel, *Avocat au Conseil d'Etat et à la Cour de Cassation.*

It begins by the filing of the claim (*recours*), which must be made on stamped paper at the rate of 3 francs 50 the sheet, and involves by way of registration and court fees costs amounting to 258 francs 15. Through the agency of the *Conseil d'Etat* the claim is communicated to the defender at a cost of 43 francs 60 for the order to communicate it and 50 francs for the information. Thereafter the parties develop their case. The plaintiff draws up on stamped paper an explanatory note—*mémoire ampliatif*—for which the court fee is 28 francs 80. The defender, after having filed his defence, the cost of which is 78 francs, prepares an answer—*réplique*—at a cost for intimation and filing of 57 francs 75. This may be followed by new observations and new rejoinders accompanied by production of documents.[1]

Finally, in the proceedings before the *Conseil d'Etat* as before the *Conseil de Préfecture*, there may be a reference to experts.

When the case is thus in shape there is a public hearing which is conducted according to the method customary in administrative courts: first the reading of the report by the member of the *Conseil* to whom the *dossier* has been entrusted, then the oral arguments of the advocates for the parties, and lastly the *conclusions* of the *Commissaire du Gouvernement*. When the decision is given it is subject to a tax for registration of 281 francs 20, to which the only additions are the stamp tax of 10 francs 80 a sheet for the drawing up of the judgment and the court charge of 10 francs. This summary indication of the procedure before the *Conseil d'Etat* leaves on one side the complications in the procedure which may arise from interlocutory judgments, interventions of new parties, oppositions, etc.[2] It is, however, sufficient to make it clear how simple this procedure is and how small are the necessary costs, seeing that the costs of both parties together may not exceed 1,000 francs. There are even cases in which the costs may be still less, for the practice of French administrative law allows in some cases a question of liability to be determined without having recourse to the ordinary procedure, the *contentieux de la pleine juridiction* which has just been described. This may occur in this way. If the person who has suffered the damage addresses himself directly to the department to obtain reparation, and if the department does not reply in a satisfactory manner, he may in certain cases, instead of bringing an action on the merits before the *Conseil d'Etat*, content himself with an application to that court to annul the decision of the department as being *ultra vires—recours pour excès de pouvoir*.[3]

In that event the *Conseil d'Etat* will not order the department to pay the damages, but if the *Conseil* annuls the decision by which the Minister refused to admit his liability and remits the petitioner, as the style of the judgment runs, to the Minister for a new decision, the practical result will be just as good for the party. Now this remedy for *excès de pouvoir* has this interesting feature, that although the stamp and "chamber" fees are payable—and these are the less important—there are no court fees to be paid (*droits de greffe*) and registration fees are held in suspense. These fees, being 187 francs 50 for the petition and 281 francs 20 for the judgment, will not be paid by the petitioner unless he fails—that is to say, unless his petition was not well-founded.

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[1] These must be in all cases on stamped paper, and the court fees and costs of registration are the same as those for the rejoinder.

[2] An *opposition* is an application to set aside a judgment by default.

[3] The cases in which the *Conseil d'Etat* pronounces decisions on the merits as the judge both of the facts and of the law are called the *contentieux de pleine juridiction*. Those which decide the legality of administrative acts are called the *contentieux de l'annulation*. Those which determine the sense of administrative acts constitute the *contentieux de l'interprétation*.—Note by Editor.

Such are the general rules of administrative procedure and the costs to which this procedure may give rise.[1] They confirm the view which we have expressed as to the liberality of administrative liability in French law.

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[1] It is needless to say that in the indications given above we have left out of account the fees which the parties have to pay to their counsel or other representatives.

THE NEW GERMAN COMPANY LAW AND THE ENGLISH COMPANIES ACT, 1929.

[*Contributed by* DR. RICHARD ROSENDORFF, *Rechtsanwalt, Berlin.*]

The International Character of the Reform Movement of Company Law.—After England finished the reform of her company law by the Companies Act, 1929, Germany also entered the ranks of those numerous countries which have, like the Netherlands, Poland, Lichtenstein, Luxembourg and Russia, already reformed their company law, or rather entered the ranks of those countries which, like Italy, Spain, Belgium, Switzerland and Denmark, have published reform projects. A comparative study seems of greatest importance and value, since there exists almost no field in which all nations co-operated as closely as here. Each nation has learned from the others and has taken over from them regulations which proved to be good and has rejected others that failed to be successful. It was even said that the country which should solve the problems concerning the company law first would carry a special responsibility, since its solution will probably determine the direction which the reform movement will take in every other country. It is of interest to note that England was one of the first nations which reformed their company law. The influence of this English reform is to be seen in the German Draft Act, which frequently refers to English institutions. Although it does not always agree with the regulations there found, it discusses them and determines its position towards the point of view which the English law took. On the other hand, the English company law of 1900 was greatly influenced by the then already established German law.

Historical Development and Methods of Reform.—The last fundamental reform of the German company law was made by the Act of July 23, 1884. Later amendments changed but little the character of the law then fixed. In England, on the other hand, the last and very important legal consolidation dates back to the year 1908.

The first German reform movement shows a long time development and began as early as 1873. Whilst the cause of this first reform is to be found in the tendency to fraud and swindle in the development of companies, the recent reform shows other motives. On the one hand it is thought advisable to adapt certain foreign legal institutions, since Germany needs foreign capital. Practical experience has repeatedly shown that to reach this aim German law has to be brought into harmony with that of those countries which are ready to provide capital. The second cause of the reform movement is to be found in the fact that the general changes in the economic structure, and especially the concentration of finances into fewer hands, has led to a diminution of the rights of the individual shareholder. The main faults of the old system are seen in the creation of shares with a preferential right of vote, in the growing influence of banks by their power to vote in proxy for those shares deposited at their bank, in insufficient publicity and information, in hoarding capital in secret reserves and finally in the alleged fact that the minority rights are not sufficiently protected and that there is insufficient provision for recourse against the directors in cases of mismanagement.

The German Lawyers' Convention at Cologne in 1926 dealt with the problem: "Should any future reform of company law approach the Anglo-American law as far as fundamental regulations are concerned?" This meeting dealt further with the question whether the time for a thorough reform of company law had come. Expert opinion was gathered on this subject. At the same time a research committee was formed to examine these problems in connexion with German marketing and production conditions. The findings of this committee have been published. After the reform movement was thus started, the Ministry of Justice published nine voluminous questionnaires, containing 762 questions. These were sent to important associations and corporations, who were asked to give their point of view. This done, the R.J.M. published in connexion with the *Reichswirtschaftsrat*, in the middle of 1930, a "Draft Act regarding the Reform of German Company Law." After the Draft was publicly discussed, a new modified Draft of the Government appeared in 1931 with which the legislative authorities will soon have to deal. A part of this Draft has, however, already become effective through the emergency measures of September 19 and October 6, 1931. The Government, under the pressure of the economic crisis and of certain events in regard to companies, could no longer postpone the introduction of certain reform measures.

In England the course of events was quite different. There too, however, it was felt that the war and post-war conditions made a reform necessary. Therefore a research committee was instituted in 1918, with Lord Wrenbury at the head. New legal regulations did not follow. Only after the interest of the general public for the reform question was newly aroused by the breakdown of one of the most respected English insurance companies, the City Equitable Fire Insurance Company, was another examination of company law started; incidentally a stimulus not very different from that which quickened the reform movement in Germany, where it was the collapse of the Frankfurter Allgemeine Versicherungs Aktiengesellschaft which aroused general interest. In 1925 the Board of Trade called together a rather large committee, under the chairmanship of Mr. Wilfred Greene, to examine further the English company law. This committee worked out a questionnaire which is divided into thirteen sections. The committee published the answers to these questions, thus satisfying a demand which was only partly satisfied in Germany. The proposals of the Greene Committee developed into a Draft Act. The new law was published on August 31, 1928, but it never came into effect because it was replaced by the Companies Consolidation Act in 1929, which made a unit of the new law and the entire body of legal regulations governing companies.

Position of the Draft in Principle towards the Reform.—The Draft of the R.J.M., in contrast to the idea that German company law is nothing but a heap of ruins, an opinion which was often publicly voiced by certain lawyers and newspapers, starts from the conviction that the German company law has in its principles proved to be good. This assumption of the Reform Draft agrees with the governing German legal and economic circles, which say that the company law is not in need of a reformation *an Haupt und Gliedern.* The nature of the Draft is therefore quite definitely that of a compromise trying to reconcile the two divergent tendencies. At the one side, influenced by foreign and especially Anglo-American law, it introduces new institutions into the German company law which we shall later examine in fuller detail. At the other side we find provisions which aim at protecting the individual shareholder more effectively than formerly was the case. The legislator hopes by these means "to prepare the way for a sound economic situation at home, to moderate the inevitable struggles in joint stock companies and to strengthen those provisions which grant protection to legitimate interests which are endangered."

It is of special interest to compare herewith the opinion of the Greene Committee in regard to the English law and the nature of its reform. Here, also, the point of view is taken that the English company law proved to be good and that there is no urgent necessity to make any fundamental change. Cases of fraud and dishonesty are only rare, and it is not right to emphasize these exceptions instead of looking at the infinitely larger number of those enterprises which are honestly administered. The cause of some of the bad cases is to be found in the abnormal conditions during and after the war. It is wrong, they said, to believe that fraud and dishonesty could be stopped by resolutions of Parliament. Impressed by these ideas, only absolutely necessary changes were effected. The following idea which the committee had pronounced became the leading principle of legislation :

> In dealing with an instrument so nicely balanced as the existing law relating to limited companies there is always the danger that some alteration, apparently desirable in itself, may have unexpected repercussions throughout the whole mechanism.

These sentences have often been quoted in Germany and were taken over in a similar form into the introduction of the Draft. The English legislator, it seems, possesses a much more temperate conception of his reform activity. His intentions are to improve the faults of the old system, while the German legislator hopes that the new law will effect fundamental changes in the economic and social life as well. The English conception, it seems to me, is justified by experience. The history of the company law and its reform proves that "legislation," as the famous Austrian lawyer Franz Klein once said, "can only regulate the form but not the spirit and the forces that enter them alternately and change them into legal and economic power. This fact explains the, so to speak, organic insufficiency of legislation in this respect."

Formation of Companies.—The present German company law (s. 182 ff., *Handelsgesetzbuch*) allows two ways of forming a joint stock company. The one is the so-called *Simultangründung* and the other the *Successivgründung*. When the first type is used, the five promoters take over from the beginning all shares of the company. The second type allows that shares may be taken over by others than the promoters in the beginning. If this type is used, s. 189, *Handelsgesetzbuch* (Commercial Code) provides that the establishment of the company has to be preceded by the subscription to all shares. The new Draft adapts the *Simultangründung* and the provisions regulating it as satisfactory. A change is only effected in a single but rather important point—that is, with regard to the liability of promoters (s. 202). The promoters are liable for the truthfulness of their statements concerning the company. The practice of formation, however, showed that they often tried to use dummies, *i.e.* other persons who took the shares on behalf of the real promoters. These dummies are to be classed together with the promoters as regards responsibility. The provisions regarding a successive formation of companies have been entirely deleted since they have lost their practical meaning because of the trend of economic development in Germany as well as in the majority of countries abroad. (See, however, the Swiss draft, s. 627, which keeps the institution.) In Germany successive formation was actually unpractised for more than a decade. The German law does not demand, in case of the *Simultangründung* type, the entire sum of all shares taken over by the five promoters to be paid in cash at once. It suffices if at least 25 per cent. are paid up. The Board of Directors may call in the residue whenever they think it necessary. This 25 per cent., however, absolutely must be paid in before the company is registered into the commercial register, and thus acquires a legal personality as a limited company. It frequently happened, however, that the 25 per cent. was only temporarily placed at the disposal of the board of directors of the company (often by a bank) and then later withdrawn. In future this procedure will not be permitted. (The Swiss Draft shows similar provisions.) The sum has to be definitely put at the disposal of the board of directors. All these provisions just mentioned deal with the so-called formation of a company by contributions in cash. The German law provides also for another kind of formation: a qualified formation which is characterized by the fact that shares are acquired by contributions in kind. This kind of formation is generally used when a one-man firm or an unlimited mercantile partnership is converted into a joint stock company. Here the law provides for a special examination ; the court, however, was not in a position to refuse registration even if the examination had an unsatisfactory result. According to s. 17 of the new Draft Act, the registrar is now entitled to refuse registration if the examiner objects thereto. The German company law demands, as just shown, a special examination with regard to the qualified formation. For various reasons this examination is not always desired, especially when it touches problems of taxation. In practice this provision was frequently evaded. A formation with contributions in cash was performed, thus evading the special examination, and afterwards the enterprise was acquired by supplementary contributions in kind which did not demand a special examination. In order to prevent these disguised contributions in kind the Draft provides that even with regard to supplementary contributions a report and an examination are required, and that the validity of any supplementary Articles of Association be subject not only as heretofore to the consent of the *general meeting*, but also to the regulations for registration in the commercial register. During the last years the Supreme Court has frequently had to deal with the problems just mentioned. These new provisions will certainly put an end to the new industry of process making which has grown up in connexion with the efforts of companies to evade the law by means of disguised contributions in kind.

Since the English company law has entirely different forms of formation, its reform did not have to treat the same problems as in Germany.

Organization of Administration.—The German law, as is commonly known, divides the administrative body into the board of directors (*Vorstand*) and a council of supervision (*Aufsichtsrat*), while the English law and the company law of many other countries has only one body of administration, the so-called board of directors. German experts often wondered whether this English system was not to be preferred to the German. They came, however, to the conclusion that there was no real reason to call the board system the better one. They took the point of view that there was nothing to cause them to leave the old system which, in principle, had stood the test of time. The council of supervision, which is essentially a board of control, upon which, however, certain administrative duties have been and still others may be placed, has always been the " problem child " of the reform movement. It was pointed out that it could not satisfactorily manage its controlling task, since the individual enterprises had grown enormously, almost beyond control. A further factor contributing to the inefficiency of the council of supervision is the fact that large numbers of industrialists and bankers hold too many offices, the number of which amounts in the case of certain influential bankers to as many as 110. In addition it often happens that people not suited for this office are chosen to the supervisory council for reasons of prestige or some other " human, all too human," reason. Years ago, Walter Rathenau compared the German council of supervision with the English navy, saying that the power of both institutions was just "in being." The legislator did not agree with the opinion of some people about the inefficiency of the supervisory council to the extent of proposing its abolishment, although he does propose to reform it at some points. He acknowledges that the present regulation puts upon this council duties which in practice cannot be fulfilled. He therefore deletes the obligation that the control has to extend over all branches of administration and delimits it to the management of the business, especially to the annual accounts, balance-sheets and the proposals concerning distribution of profits. The results of the examination have to be reported to the annual stockholders' meeting. In the German reform movement the opinion was frequently heard that a minority of shareholders ought to have the right to be represented in the council. Strong opposition to this opinion developed, but the legislator thought it sufficiently justified to provide in s. 76 of the Draft that a minority whose shares amount to one-tenth of the capital of the company shall be entitled to demand the appointment of one representative on the council.

Under the present law a single member of the council is not entitled to make examinations on his own authority. Only the council in its totality has this right. It therefore sometimes happened that individual members of the council who believed they had good reason to mistrust could find no way of effectively directing attention to the supposed evils, or when finally called upon to testify they could excuse themselves by saying that they had no definite knowledge of the situation.

The influence of individual members within the duties and privileges of the *Rat* are further extended in so far as that the chairman is compelled to call a meeting of the council of supervision upon the request of an individual member, his request and reason therefor having been presented in writing. A completely new section provides that members of the board of directors or members of the supervisory council shall be granted loans only with the explicit consent of the council of supervision. The dropping of the definite sections is necessitated by the fact that both regulations have in the meantime become enacted. It would, I think, be less confusing to leave out the section numbers.

According to the present German law, the members of the board and the council are responsible for any damage which the company suffers because of their default in complying with the provisions of the law. Reparation for loss can not only be demanded by a resolution of the majority, but also by one of the minority which possesses shares amounting to one-tenth of the capital of the company. It was, however, very difficult for the minority to carry such a claim through to success. This minority group had not only to deposit shares representing one-tenth of the capital of the company for the whole period of the law-suit, but also could be made to deposit an additional security, the size of which was determined by the court. In many cases these two provisions made such processes very difficult, if not impossible. In the future such additional security shall only be demanded if the court is made to believe that the defendant may get a claim for compensation against the minority. The court is, besides, allowed to return the shares to the minority before the end of the law-suit. Finally, it is provided that a 5 per cent. minority (instead of the former 10 per cent.) is entitled to sue the administration for compensation when the report of an examining committee indicates the possibility of mismanagement. In a comparison between the single-body system of administration as is provided, for example, by the English and Swiss law, and the German system of dividing the administration into two bodies, the fact is often overlooked that this difference is more formal than real. For in practice the management is not exercised by the entire board of directors, but only by those to whom this task is explicitly delegated. The managing directors hold an office which is essentially like that of the German *Vorstand*. It is interesting to note that some English experts, as, for example, in "Britain's Industrial Future, being the Report of the Liberal Industrial Inquiry," believe that "the right line of evolution is towards the system now commonly established in public companies in Germany, namely, that of having in addition to the Board of Directors a Council of Supervision."

As the Greene Committee reports, "Public attention was directed by the decision in the City Equitable Case to the common article which exempts directors from liability for loss except when it is due to their wilful neglect or default." The report says: "Another form of article which has become common in recent years goes even farther and exempts directors in every case except that of actual dishonesty." The new law declares (s. 152) that such exemptions of liability shall not be permitted. However, s. 273 empowers the court to free the sued director from his liability when in the court's judgment "he has acted honestly and reasonably and, that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust." This is a much greater limitation of the liability of directors than occurs in German law. On the other hand, the English law is in many points stricter than the German law. It requires, for example, in s. 182 of the Companies Act, 1929, that loans given the directors or any other officer of the company and their aggregate amount shall be stated in the annual accounts. Further, remuneration paid to directors shall be disclosed to the shareholders: "We consider that shareholders representing a substantial portion of the voting power should have the right to requisition a certified statement of the remuneration, etc., paid to directors, including managing directors." Still further, according to s. 149, any contract with the company must be disclosed. And finally, the former system of leaving criminal prosecution to private initiative is abandoned and provision is made for an official procedure through the Director of Public Prosecutions.

(*To be continued.*)

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.].

The Statute of Westminster.—Singularly little enthusiasm marked the passage through the Houses of Parliament of the Statute of Westminster. It was clear from the attitude of the majority of those who spoke on the Bill that British opinion was not favourably inclined to the attempt to define by legislation the constitutional relations of the various parts of the Empire, and that the measure was accepted merely because it was desired by the Dominions, and was the logical sequence of the results of the Conference of 1926. The stress laid on this point by Lord Hailsham[1] is very interesting, because it throws a vivid light on the informality of the method in which the constitution of the Empire had, in fact, been changed. The Report of the Inter-Imperial Relations Committee of the Conference of 1926, which thus brought about the necessity of accepting the Statute of Westminster, was never submitted to the approval of the British Parliament at all, nor was it adopted by the Parliaments of Canada, the Commonwealth of Australia, New Zealand or Newfoundland.[2] It thus fell to the lot of the executive government of the United Kingdom to determine, without even approval *ex post facto* by the House of Commons, the course of events leading up to the Statute of 1931. Moreover, it must be admitted that the Statute in fact goes beyond the Report of 1926, and, while Lord Balfour would doubtless have been willing to acquiesce in the advance, his report did not contemplate anything like the formal result achieved in the Statute. In particular, the report definitely envisaged the modification rather than the repeal for the Dominions of the Colonial Laws Validity Act, 1865, and its attitude on the issue of extraterritorial legislation was carefully guarded. The expert Conference of 1929 disregarded the limitations suggested in the report of 1926, and the Conference of 1930 adopted their recommendations in substance, drawing up a form of Statute for enactment at Westminster. The procedure adopted had the grave disadvantage that it deprived Parliament of any control and placed it in a worse position than any Dominion Parliament. These Parliaments had the issue of acceptance of the proposals presented to them without coercion to accept, but the House of Commons was confronted with a *fait accompli* and the intimation that great perturbation would be aroused in the Dominions by hesitation or delay. It cannot be said that such a mode of procedure is satisfactory. Parliament should have been consulted in 1926 and again after the Conferences of 1929 and 1930, and it may well be that the results of its criticism would have given a more satisfactory shape to the Statute, which as it stands offers a plenitude of opportunity for legal criticism.

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[1] *House of Lords Debates*, vol. lxxxiii, p. 242.

[2] Keith, *The Sovereignty of the British Dominions*, pp. 12–26.

The Sovereignty of the Imperial Parliament.—The Act itself, of course, is a singular assertion of the sovereign authority which still adheres to the Imperial Parliament. As Mr. Latham pointed out in the Commonwealth House of Representatives, the Statute itself cannot be altered by the Dominions, and it was necessary to secure the insertion of s. 10 to prevent its automatic application to the Dominions as a whole. As it is, it applies, without power of alteration by the Dominions concerned, to Canada, the Union of South Africa and the Irish Free State, while the Commonwealth of Australia and Newfoundland have been associated with New Zealand in securing the power of partial or complete adoption and partial or complete repeal of such adoption. But even to them no power merely to alter is accorded. Attention was duly called in the House of Commons to the impropriety of the power to apply the measure *ex post facto* which the Statute gives. It is indeed impossible to defend the wording of the Statute, and Sir. T. Inskip[1] contented himself with relying on the fact that the Dominions had desired the terms employed. To declare that a criminal statute which had formerly a mere local extension should *ex post facto* be deemed to have had extraterritorial effect is, it may be hoped, action which no Dominion will take, but why it should desire the power so to declare is incomprehensible, and it is unfortunate that the issue was not brought before the Dominion Parliaments. The unalterable character of the Statute, of course, is essential if it is to serve the essential purpose of preserving intact the constitutions of the Dominion of Canada, the Commonwealth of Australia and New Zealand. This, of course, means that the doctrine of repugnancy of Dominion legislation remains unimpaired in all constitutional issues affecting these Dominions. The cessation of application of the Colonial Laws Validity Act, 1865, to the Dominions thus appears in its true light as a matter of very minor importance, outside the sphere of Merchant Shipping legislation. For many years, when the doctrine of repugnancy has arisen in the courts, it has turned on constitutional issues, and these are once more expressly entrenched by an Act which the Imperial Parliament alone can change. Nor, it seems, is the position different as regards the Union of South Africa, though in accordance with Union wishes, the Statute does not fetter Union power by express reservation as to constitutional change. The Union Parliament has asserted that the new power given does not authorize it to alter the Cape native franchise or the rules as to language in the constitution save under the conditions laid down in s. 152 of the South Africa Act, 1909. Legally this can only mean[2] that the Imperial

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[1] *House of Commons Debates*, vol. cclx, pp. 291, 292.

[2] Lord Hailsham's doubts as to the effect of the resolution were not disguised.

Act of 1909 has a superior authority to any Union Act, and that, despite the wide power given in the Statute, Union authority does not legally extend to the alteration of the constitution, which, as the source of Union legal power, can be changed only in accordance with its own terms. Very possibly this view may appeal to the courts if the issue should ever arise; it must frankly be admitted that General Hertzog was as far from lucid as General Smuts as to the legal signification of the resolution of their Parliament.

Extraterritorial Legislation.—Nothing was said in the Imperial Parliament to justify the terminology of s. 3 regarding powers of extraterritorial legislation. Sir T. Inskip was naturally pressed with the obvious argument[1] that, as the power was given in absolute terms, the Dominions would be free to make such use of it as they pleased, so that the Irish Free State might impose legally penalties for actions done in Northern Ireland if regarded as inimical to the Free State. His reply,[2] the only one possible, was the assertion that in practice the Dominions would use wisely the authority conceded. This may be assumed, but unfortunately there is great divergence of view quite honestly possible as to the extent to which a country is entitled to protect its interests by giving its legislation extraterritorial effect as regards persons not by reason of domicil or nationality normally subject to its jurisdiction, and conflicts are easily imaginable without imputing bad faith. An obvious instance is that of legislation affecting fisheries in waters used by Free State and Northern Irish fishermen; it is impossible to deny that under the Statute the Free State has full legal powers to deal as it pleases with Northern Irish fishermen who are alleged to contravene Irish Free State legislation extending beyond territorial limits. In point of fact agreement on the mode of exercise of such powers should have accompanied the acceptance of equality of authority, especially as Northern Ireland is not possessed of equal powers with the Free State, and cannot therefore protect herself against possible encroachment by means of retaliation.

Merchant Shipping Legislation.—The discussion of this issue in Parliament proved that the agreement on this topic[3] which was drawn up and approved by the Conference of 1930 has been understood as providing for a far greater degree of uniformity than in fact is the case. Nor was the obvious point taken that it would have been well had the Empire been able to agree to the simple rule that each part thereof should be allowed, subject to international agreements, to control its own shipping and its coasting trade, leaving the other parts to do likewise, and that each part should act as an auxiliary to the others in enforcing its rules for its own shipping. The agreement, in point of fact, is deliberately so loosely worded as to leave to the Parliaments of the Dominions a wide discretion as to making applicable to British or other Dominion vessels trading to their ports domestic requirements in excess of or divergent from those deemed necessary by their own governments and Parliaments. Even were the agreement to be given legal effect, it would still permit such action, but no such effect is to be accorded to it ; it is to have only the value of an executive accord, and its effect on Parliaments can only be tested by experience. All that is clear is that it will be legally open to the Commonwealth Parliament under a Labour regime to pass legislation applying Australian conditions of accommodation, pay and manning to any British ships trading to the Commonwealth, and that in opposition to such action there can be quoted only a decidedly vague and quite informal agreement which has been deliberately withheld from Parliamentary approval. As Mr. Latham has insisted, in Australia at least accords not approved by Parliament are of minimal value, and in so far as the House of Commons really held that the agreement secured uniformity, as the speakers seemed to hold, it has acted under a misapprehension of fact. The position of the Australian government, in fact, is analogous at the highest to that of a government under the provisions of the Labour Organization of the League of Nations. Its duty will be fulfilled if it urges on its Parliament respect for uniformity of conditions, but the House of Representatives is wont to assert its independence of governmental leading.

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[1] See Mr. W. Stewart and Mr. C. Williams, *House of Commons Debates*, vol. cclx, pp. 267, 268, 274.

[2] *Ibid.*, p. 270.

[3] Signed December 10, 1931. See *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. i, pp. 29–32.

The Commonwealth and the States.—It is significant of the general inclination in the United Kingdom to overlook the position of the States in Australia that much surprise seems to have been felt at the formal recording of protests by the legislatures of Western Australia and Tasmania against the enactment of the Statute. The States indeed as a whole showed little enthusiasm for the measure, and that for very good reasons. Whereas in Canada the matter was brought before the provinces and discussed with their governments and concessions made, the Commonwealth dealt with the issue in independence, and, if the Statute had been passed as originally drafted, it might even have encroached on the position of the States. The changes included at the last moment with the assent of the States and the Commonwealth Parliament have the merit that they leave it still open for the Imperial Parliament to legislate for the States, in matters not within the ambit of Commonwealth power, without the necessity of any application by the government or Parliament of the Commonwealth. But nothing has been done to assure to the States an extension of their powers. The Colonial Laws Validity Act, 1865, still binds them, and they have no concession of extraterritorial authority. It was argued that the Commonwealth should have power to penalize Australian citizens who forged Australian banknotes on a Pacific island and to make its taxing legislation effective without Australia, but the States are left to the rigorous application of limitation of their criminal and taxing laws.[1] On the latter topic there will exist much confusion pending a decision of the Privy Council, or the House of Lords. Does the Statute mean that the Commonwealth Parliament can require an English company which derives profits from Australian trade to deduct from the dividends which it pays to another English company Commonwealth income-tax on these profits ? The lack of extraterritorial power was one of the grounds of a negative decision in the analogous case of the *London and South American Investment Trust Ltd.* v. *British American Tobacco Co.*[2] It may be that the same result as was achieved in that case can still be reached on other grounds, but the fact remains that in strict law it might quite easily be held that the Statute has given validity in England to such a measure of exercise of legislative power by the Commonwealth as was in that case contended for. It is, in fact, impossible not to agree with Mr. Latham that the clause as worded is a potential source of danger. It remains to be seen what will be done as regards the powers of the States. There is no doubt something to be said for a carefully worded extension of their powers, for unlike the provinces they control criminal law, and are still bound by the ruling in *Macleod* v. *Attorney-General for New South Wales*,[3] so that they cannot punish bigamy committed outside their territorial limits.

Canada and the Provinces.—The fact that a Conservative government was in power when the Conference of 1930 met necessarily involved due regard for the wishes of the provinces, and in special of Ontario, for Mr. Ferguson was one of the chief supports of the Conservative movement which triumphed at the election of 1930. The protests of Ontario were strengthened by those of Quebec, where the Premier remains as firm as ever in the necessity of preserving the sanctity of the British North America Act, despite the laxer doctrines of his compatriot, Mr. Lapointe, who was one of the inspirers of the report of the expert Conference in 1929. It was, however, a fundamental step towards asserting the compact theory of federation when it was decided by Mr. Bennett to secure the full agreement of all the provinces in the passing of the Statute. On the other hand, the novelty of the measure must not be exaggerated. Apart from the unanimous voice of the framers of the constitution in 1865 that the constitution was to be regarded as a pact, there can be cited the procedure of 1907 when the provincial subsidies were remodelled by Imperial Act. This was the most vital change made in the British North America Act since its enactment, and it rested, in fact, on the agreement of all the provinces. It is true that British Columbia was dissatisfied, but the Premier when in England made it clear that, if he could not obtain better terms, he was in no way prepared to oppose the enactment of the measure, so long as it was made clear that the Imperial Act was not immutable, and the British government naturally had no difficulty in reminding him that in the nature of things no Imperial Act can be exempt from change. Nor was consultation and obtaining their consent the only recognition of the just claims of the provinces. They are included in exemption from the restrictions of the Colonial Laws Validity Act in future and so can alter any Imperial Act which may interfere with their local interests on topics within their ambit of power. It must be added that it is by no means clear what is referred to by Mr. Bennett when he urged that it would, as a result of the concession of power, be competent to the provinces to alter statutory rules of evidence ; it is, of course, already open to the provinces, apart from the Statute, to alter any British Acts introduced merely as part of the local law and not enacted specifically for the colonies in general or any colonies in particular. The power to alter the Dominion Constitution still remains with the Imperial Parliament alone ; Mr. Lapointe has argued that this matter, as well as the right of appeal to the Privy Council, are not inconsistent with autonomy, but the difficulty in this argument is that not a single modern autonomous state has thought it compatible with its status to leave to an external power the function of constitutional change and the judicial protection of the constitution, not to mention the correct interpretation of the laws of the Dominion and the provinces. The truth, of course, as Mr. Lapointe has himself admitted, is that there is a conflict of autonomies in Canada. The appeal in civil matters cannot be abolished as a matter of practical politics except for the Dominion and the provinces alike, and, as long as some even of the provinces insist on its maintenance, no lawyer would contemplate the chaos which would result from its partial abolition.[1] But it remains clear that Canadian politicians have before them a plain duty to create a machinery for amendment of their constitution without extraneous aid and for the local decision of their own law suits. Even if we admit that they are better decided in London, the present regime derogates from Canadian status and renders somewhat absurd the reiteration of the doctrine of equality with the United Kingdom.

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[1] *Commissioner of Taxes* v. *Union Trustee Co. of Australia*, [1931] A.C. 258 ; *Mount Morgan Gold Mining Co.* v. *Commissioner of Income-Tax* (1923), 33 C.L.R. 76, 114, *per* Starke, J.

[2] [1927] 1 Ch. 107. See Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 638, 639.

[3] [1891] A.C. 455.

The Question of Nationality.—So little was the Statute understood that an amendment was pressed to provide that nothing in the Act should deprive any subject in any Dominion of British nationality. The real aim of the proposers of this suggestion was to secure that the Irish Free State would not have the legal right to repeal the definition of British subject in the British Nationality and Status of Aliens Act, 1914, so as, for instance, to declare that its citizens were not British subjects or that persons born within its area were not such subjects. No such legislation, of course, would have any legal effect outside the Free State, for obviously, if an Irish Act purporting to have extraterritorial effect comes into conflict with an Imperial Act with such effect, courts outside the Free State will be bound by the Imperial Act. As worded, the amendment was meaningless, and the government easily disposed of it on that ground, without attempting to meet the argument that by Irish Act the minority might be deprived of British nationality and so rendered unable to invoke the intervention of the British government. The real answer to the latter point, if it ever arose, is simply that the only right of intervention given to the British government is that of demanding from the Free State respect for the terms of the treaty of 1921, and no Irish legislation can impair that right.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, pp. 251, 252.

The Position of the Irish Free State.—The real interest of the discussion centred in the issue of the position of the Irish Free State. The opinion had been propagated and was accepted by Mr. Churchill that the passing of the Statute would enable the Free State to relieve itself of the fetters of the treaty of 1921 which was given Imperial and Irish validity by Acts of the Imperial Parliament and of the Irish legislature in 1922. The idea rested on a confusion between international law and municipal law which was not altogether removed by the remarks of the Lord Chancellor.[1] He drew a distinction between moral and legal obligations, which is frankly inadequate. The Irish contention has never varied that the treaty of 1921 is a formal compact akin to a treaty of international law, and binding on the parties in the sphere of international law. The British government in 1921 and ever since has regarded it as at least an inter-imperial compact binding on both sides,[2] and this obligation ought to be described as legal. To regard it as a mere piece of morality is untenable, and one can only suppose that the Lord Chancellor was afraid to use the term "legal" of the bond lest he be deemed to concede that the treaty was governed by international law and that the Free State was a sovereign independent State in international law. The only sound view is that of Mr. Cosgrave, whose letter of November 21, 1931, was unquestionably largely instrumental in the acceptance of the Statute by the Commons. The pact legally binds the Free State, and that in two distinct senses; externally, it owes a plain obligation to the United Kingdom to fulfil its terms, just as it has an unqualified right to fulfilment by the United Kingdom of its obligations under the pact; internally, the pact is the supreme law of the land, subject to which its constitution is expressed to operate. It is wholly impossible to assume that the Free State would repudiate either legal obligation, and it is happily impossible to show that any intention of repudiation has been expressed by the Free State government. Mr. de Valera, of course, never accepted the treaty, but a government formed by him would still be bound legally by it and would have to resort to negotiation for any change to be made, and it must be remembered that it requires a very considerable measure of ingenuity to distinguish between the present system of the operation of Irish government and that proposed to be accepted in Mr. de Valera's well-known project of 1921–2.

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[1] *House of Lords Debates*, vol. lxxxiii, p. 186 *f.*

[2] Keith, *Responsible Government in the Dominions* (1928), vol. ii, pp. 843 *f.*, 884–6.

The Appeal to the Privy Council.—It was most unfortunate that the debate even in the House of Lords failed to bring out the true issue as to the power of the Free State to abolish the right of appeal to the Privy Council. Lord Danesfort insisted that the appeal was contained in the treaty, in the Irish constitution, and rested in addition on the prerogative. Clearly the Free State can control the prerogative when free from the overriding authority of the entrenchment of the constitution by Imperial Act, and the only issue is whether the treaty prevents such action, for in that case the Free State is bound both externally and internally to admit of the existence of the appeal. Now the issue regarding the effect of the treaty is not at all simple. It has never been denied that the authoritative interpretation of the treaty by both parties gives it the meaning that any right which either in 1921 was enjoyed by Canada, or since then has come to be possessed by Canada, shall enure to the benefit of the Irish Free State. Hence the Free State was allowed in 1924 the right of setting up a legation at Washington, though the power of Canada to do so, as conceded in 1920, had never been acted on by that Dominion. Now the Free State can claim the right to abolish the appeal if Canada has the right, and, as I have suggested,[1] Canada has under the Statute the legal right to cut off the appeal in civil cases from the Supreme Court, though it cannot abolish the appeal from the provinces direct to the Privy Council. On this analogy the Free State may have in law the right to cut off the appeal from its Supreme Court to the King in Council, and if so the attacks made upon it in the Commons and Lords alike are unjustified. Every country has a right to exercise powers which legally belong to it under treaty, and, if the British government in 1921 had felt the appeal issue paramount, it ought to have inserted in the treaty an obligation to accept both the right of appeal and the obligation to give effect to the judgments of the Privy Council. It has appeared to me, as pointed out in 1922,[2] that the mere obligation to admit an appeal was not sufficient security, and the effective annulment of the utility of the appeal by the Free State has proved that the provision made was inadequate. The really unsatisfactory point of the position[3] is that stressed also by Sir Stafford Cripps and alluded to by Lord Hailsham, the absence of any agreement between the United Kingdom and the Irish Free State for the reference to an inter-imperial tribunal of any issue arising from the interpretation of the treaty of 1921. Granted that it is not reasonable to expect that the Free State should be content with the exposition of the treaty by a tribunal which contains no Free State members, it is equally unfair to expect that the United Kingdom shall accept the interpretation given by the Free State as necessarily sound, or that it shall be willing to submit inter-imperial differences to a foreign tribunal. No one can seriously suggest that from the Empire there could not be selected a tribunal whose impartiality would be above suspicion, and whose rulings would be accepted as authoritative by all the parts of the Empire.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, p. 251.

[2] *The Times*, June 19, 1922.

[3] *The Times*, November 18, 1931. For a very interesting explanation of the Irish Free State view see Mr. McGilligan in *The Star*, 1931, p. 207, a copy of which I owe to his courtesy.

The Empire and the Commonwealth.—A curious opinion was expressed during the debate in the Commons by the Solicitor-General, whose exposition of the measure was the ablest defence of a rather unsatisfactory text, when he treated the British Commonwealth of Nations as denoting specifically the Dominions, to the exclusion of the rest of the Empire. This view apparently was shared by Mr. Thomas, but, of course, it is untenable. The Empire and the Commonwealth are used as synonyms in the Irish treaty and the legislation confirming it, and this is the only satisfactory terminology. It then depends on the aspect from which the Empire is viewed whether it is so described or whether the Commonwealth is referred to. The implication of the latter term is the division of the Empire into several units which are or may be equal in status, the United Kingdom and all the other parts of the Empire not independent of its control, the Dominions, and India which potentially has Dominion status. In a less satisfactory manner the term is sometimes employed, as to some extent in the report of the Committee of 1926, to denote the United Kingdom and the Dominions, but this usage is only popular, and has no legal force. The British Commonwealth Merchant Shipping Agreement of December 10, 1931, includes necessarily India as part of the Commonwealth, and the agreement must also be deemed to include the Crown Colonies and other territories in its ambit. Otherwise we should have the absurd result that the United Kingdom would have agreed to a system under which no guarantee of uniformity of treatment would be extended to shipping registered in a Crown Colony, so that these colonies would be forced by the Merchant Shipping Act to accord privileges to Dominion shipping which could be refused to their shipping.

The Irish Free State and Foreign Relations.—It remains, indeed, remarkable that the two Houses of Parliament should have ignored almost completely the great importance of the concession achieved by the Irish Free State in regard to the supersession of the use of the Great Seal of the Realm in connexion with Irish diplomatic instruments.[1] It is hardly satisfactory that the Dominions Secretary should have failed to give a lucid exposition of the issues involved and the motives dictating the greatest departure yet known from Imperial unity in foreign affairs. Moreover, the obscurity of the issue has not been wholly illumined by Mr. McGilligan's references, for he has treated this vital question as if it were a minor achievement instead of one of a most fundamental character. It seems also that there has been more delay in action than was expected in March 1931, for the new seal was not yet in use in July. Of course the importance of the fact is rather formal than material. The obligation of consultation between the several parts of the Empire accepted at each of the Imperial Conferences by the Free State will doubtless be frankly accepted and respected in practice, and the chief value of the regular adoption of the use of the Great Seal was the fact that business thus had to pass through a Secretary of State and so fall under the cognizance of the Imperial government. Under the new regime the King will have full knowledge, but so also will the British government, and there should be no possibility of His Majesty being placed in the awkward attitude of having to communicate to his British ministers matters not already made known by the Irish Ministry. It has, indeed, been suggested that the right of direct access to the King and the use of an Irish seal will increase the importance of the personal rôle in government which must be played by the Crown, but a glance at the view of Irish ministers and consideration of the fate of any Irish government which was known to have deferred to royal suggestions show that any action of this kind by the King would be fatal. It is, in fact, essential to recognize that the position of the King is vitally different in regard to British and Dominion affairs. In the former case he possesses by history and practice a measure of authority of a real character which cannot be reproduced in regard to his relations to the Dominions. The question, therefore, arises whether it is wise to require the performance by the Crown of formal actions on ministerial advice which the King cannot effectively discuss with the ministers who tender it, or whether it would not be wiser to arrange for the transfer to the representatives of the Crown of certain prerogatives in external affairs, just as the prerogative in internal affairs has already been handed over. The issue fortunately may not become of substantial importance, but it is certain that nothing would be more fatal to the Empire than any refusal of the Crown to act on the advice of Dominion ministers, and that it is impossible to place on the Crown the obligation of co-ordinating Imperial policy, a view for which there is no hint of Dominion support.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, p. 255.

The Free State and British Treaties.—A certain obscurity envelops the delicate issue of the position of the Free State with regard to treaties concluded by the United Kingdom. In the first place, Mr. McGilligan appears to have won some success for his view that it is within the right of the Free State either to claim the application to it of existing British treaties or to decline to be bound by them. At any rate, Italy appears to have agreed to regard the Free State as released from the treaty of 1883, though relations were to be regulated by it until a fresh treaty was concluded, and a special treaty has, in fact, been drawn up arranging for facilities for Irish shipping in regard to the emigration traffic. As a matter of international law, it is far from clear[1] that the elevation of the Free State to Dominion status could confer upon it any right to stand free from existing treaty obligations, and it may well be that the true position in law simply is that the change of status affords adequate ground for the foreign States concerned to admit that the Free State might be released from obligations if it so desired. At any rate, if any difficulty were to arise, the Free State is bound to allow the Permanent Court of International Justice to decide the question, and there are many reasons to suppose that there is no chance of friction. In the second place, if we press Mr. McGilligan's declarations, we might conclude that the Free State claims no rights for her citizens under British treaties, on the score that the British government is a foreign government and therefore cannot conclude compacts for the Free State any more than a purely foreign State, *e.g.* Italy or Japan, could do, a doctrine reminiscent of the days when an American patriot could declare that the British Parliament could no more legislate for America than could the Mohawks.[1] On the other hand, it must be noted that Irish practice does not square with this extreme view. Thus the Irish government has not hesitated to avail itself of the remarkable privilege which the British government still secures for the Dominions by its treaties, which, of course, are expressly signed so as not to bind the Dominions. These treaties secure not only the right of adherence for the Dominions, but, if they do not exercise this right, the right to most favoured nation treatment so long as they accord such treatment to the foreign State concerned. The Free State does not desire,[2] it seems clear, to adhere in such cases, but it has, for example, very recently claimed the rights under the treaties of most favoured nation treatment in the case of Rumania and Guatemala, and there seems no doubt that Free State practice is very sensibly more elastic than in theory it should be. A further difficulty is suggested by the new treaty with France, for apparently it was intended that it should supersede the British treaty of 1882 covering the topics dealt with, but on further consideration this provision is omitted and the relation between the two instruments is left wholly undetermined by express words. Presumably this may have been due to the dislike of thus openly admitting that the treaty applied prior to the new compact, but other explanations are possible. It does not appear, however, that Irish citizens hesitate to claim when abroad the privileges accorded in British treaties to all British subjects. But unquestionably the new status of the Dominions and the demand for distinct nationalities raise the question whether foreign States can be expected to concede to the nationals of Dominions which do not adhere to treaties the benefits conferred on British subjects generally. Logically the demand for the right to enjoy such privileges can hardly be sustained. But for the time being it remains as a singular example of the divergence in function between the United Kingdom and the Dominions.

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[1] A mere change of form of government is quite different from the breaking up of a state (Keith, *Theory of State Succession*, pp. 99–101).

Martial Law in the Irish Free State.—A melancholy proof of the deeply disturbed condition of the Irish Free State is afforded by the necessity of passing the seventeenth amendment to the constitution. Incidentally it must be admitted that the ease of constitutional change by simple Act has rather falsified the intentions of the framers of the constitution who allowed only eight years for this light-hearted process, and even then fortified it by the possibility of the demand of a referendum which has now disappeared. By the new measure the Executive Council is given the power to declare in force the substantive parts of the Act, and thereupon the constitution is overridden by the Act so far as it disagrees with it. And the disagreement is profound, for the constitution is intended to secure liberty of person and speech against hasty interference, while the Act provides for the erection of a tribunal of military officers with the widest authority. The tribunal may punish at its discretion for contempt of court whether committed before it or not, and it has jurisdiction over a long list of offences under the Treasonable Offences Act, 1925, the Juries (Protection) Act, 1929, the Firearms Act, 1925, seditious libel, and, last but not least, any offence whatever which a minister certifies to have been done in his opinion in order to impair or impede the machinery of government or the administration of justice.[1] Moreover, the tribunal may inflict any sentence it pleases, including death, though no such penalty is prescribed by law. There is no appeal from its decisions, and convictions by it entail loss of office or pension, and ineligibility for office. Power is given to the executive to arrest and detain on suspicion, and to proclaim public meetings ; unlawful associations may be declared and membership then may be punished at discretion by the tribunal, which may also declare publications seditious and close buildings. The drastic character of the authority was justified by the existence of armed enemies of the government, but the plea of the administration was not cordially received by the opposition. Assuming the justification for the measure, it must serve as a grave warning to all engaged in fomenting Indian unrest, however patriotic the motives. The hostility to government which was regarded as patriotism during the contest with England has perpetuated itself in Ireland in the form of hostility to any government whatever, however purely Irish, and there is only too much reason to fear that any Indian government will be confronted by the need of equally drastic action. It will be noted how much farther the executive has gone in the Free State than in India, and how useless have proved the declarations of right in the constitution when serious action has been desired.

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[1] Keith, *Constitutional History of the First British Empire*, p. 378.

[2] Keith, *The Sovereignty of the British Dominions*, pp. xiii, 281.

The Australian Dissolution.—The dissolution of the Commonwealth Parliament was the inevitable result of the defeat of the administration on November 25, 1931, through the temporary co-operation of the opposition with the extreme left wing of the Labour movement. As before, it was through Mr. Theodore that friction arose, for the accusation was made by the extremists that he had unfairly furthered the interests of that section of the unemployed in whom he had special political interest as constituents in administering the relief funds of the government. That on defeat on this issue Sir Isaac Isaacs should grant a dissolution to Mr. Scullin was only natural, but the Governor-General was careful to base his decision on the new status acquired by the Dominions. He expressly homologated the conclusions which I derived from the crisis in 1926 in Canada,[1] and held that it was now the duty of the Governor-General to accept in such circumstances as had arisen the advice to dissolve, in lieu of seeking to secure a ministry which would carry on the administration in place of Mr. Scullin's government. The personal sphere of action of the Governor-General is thus to be deemed to be rigidly confined within the same limits as are applicable to the King. This attitude, of course, in no way contradicts that of the Governor of New South Wales as regards the demand of his ministry for the swamping of the Upper House. The Governor originally[2] was no doubt justified in his refusal to accept the demand of Mr. Lang, and his later decision to appoint further members to the number of twenty-five, including women, was, despite the severe criticisms passed on it in the State, doubtless based on full consideration of all relevant issues. It was made clear that his action was in no wise dictated by the Dominions Secretary, though of course there would have been nothing unconstitutional in his asking advice if he desired to do so. On the other hand, the Legislative Council's position has been rendered rather farcical by its recent accessions of numbers, and it is impossible not to regret that steps were not long ago taken to provide the State with an effective Upper Chamber. It must be remembered that the policy which recently has been pressed by Mr. Lang was not that which he announced when he secured the suffrages of the electorate, and that Australian credit has suffered perhaps irretrievably for many years from his repudiation policy, which ran counter to his pre-election pledges. As in Queensland, experience shows strongly the risks of leaving legislatures uni-cameral in constitutions which have no checks on legislation in favour of sanctity of contract.

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[1] Jurisdiction is retrospective, an unfortunate provision contrasting curiously with the refusal of the Parliament to legislate retrospectively to preserve copyright remedies of British authors, etc. See *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, pp. 288, 289.

The Reform of the Constitution.—Unfortunately there seems as little prospect as ever of any progress in the direction of securing an agreement on the future of the constitution of the Commonwealth. The Labour party is still anxious to obtain something in the shape of unification, or at least the transfer to the Commonwealth of the widest measure of power over industrial matters. On the other hand, the claim has been raised for the creation of new States, and for the diminution of federal authority. So skilled an exponent of the constitution as Sir W. Harrison Moore[3] has

[1] *Responsible Government in the Dominions* (1928), vol. i, pp. 147–152.

[2] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, pp. 255, 256. For an Australian view, see F. W. Alexander, *The Australian Quarterly*, June 1931, pp. 77–83.

[3] *The Australian Quarterly*, June 1931, pp. 16–35.

urged that the Commonwealth should leave industrial matters to the States, which are better equipped by local knowledge to handle these issues effectively, and that it is worthy of consideration whether its powers of taxation should not be limited to provide for its own needs. He has suggested also that the Senate might be remodelled, and might consist of representatives of the States, who could exercise functions other than purely legislative. The new body might be charged with the duty of organizing and supervising conferences of State officials on the many issues of common interest. It might act as a general economic council, receiving the advice of an expert Economic Bureau, thus serving to secure effective consideration of those economic factors whose neglect brought about the recent financial difficulties of the Commonwealth. It might even, on the German model, serve as a means of discussing with the federal government all legislative and economic or financial issues before they were brought in bill form before the legislature. No doubt it would be unwise for such a body to act in legislation and finance as a separate chamber, seeing that it would then almost inevitably develop a power incompatible with responsible government. But for assent to legislation and finance the members might sit with the House of Representatives, and if each State had three senators, and the minimum State representation in the House were raised from five to six, the four States with small populations would have in a house of 95 members 41 votes instead of 27 out of 75 and thus they would be assured due consideration of their needs, which at present is withheld. This is an interesting suggestion, but there seems little chance of it being seriously taken up by either party, and the prospect for constitutional evolution remains extremely unpromising.

Western Australia and Secession.—Meanwhile the Western Australian Parliament has looked with favour on the proposal of the government that the State should contemplate the possibility of secession by means of referendum, and if necessary Imperial legislation, from the Commonwealth. This raises a difficult issue, but it is perfectly clear that Imperial legislation of the kind contemplated is out of the question. The State deliberately after a referendum joined an indissoluble federal Commonwealth, and nothing but the utter breakdown of the Commonwealth system or the abandonment of the federal principle could possibly justify Imperial intervention. Of course an Imperial Act to vary the Commonwealth constitution on the request of the Commonwealth and the States is quite a different thing, but that contingency is decidedly remote. For the time being the advent to power of a government in the Commonwealth opposed to Labour policies will doubtless help to lessen friction.

The Control of Aviation in Canada.—The decision of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario* [1] reverses the decision of the Supreme Court,[2] and asserts in a very unambiguous manner the paramount and exclusive legislative and executive power of the

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[1] 48 T.L.R. 18.

[2] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. 1, pp. 122–4.

Dominion to implement the obligations of the Dominion or the provinces under the convention for the regulation of aerial navigation. There can be no doubt of the convenience of the decision, which definitely asserted that so much of the field of control of navigation was covered by the powers of the Dominion under s. 132 of the British North America Act and the provisions of s. 91 (2), (5) and (7), while none of the matters were specifically provincial, that it must be assumed that the Dominion power included all that remained, under the general authority of s. 91, to legislate for the peace, order and good government of Canada. Due weight was allowed in this decision to the fact that the matter is one of national importance, and has attained such dimensions as to affect the body politic of the Dominion. Stress also was placed on the obligation of legislation laid upon Canada by the acceptance of the convention ; this is interesting as showing that, if Canada accepts a treaty, it is not enough to allow the provinces to legislate ; there arises a definite obligation on Canada itself to take action. This suggestion raises difficult problems, for it can be interpreted as an encouragement to the Dominion to invade the sphere of the provinces by concluding treaties, and then alleging the obligation of legislating over the head of the provinces to give them effect. But the decision doubtless must be read in the light of the peculiar subject-matter. Aerial navigation is not a matter which can safely be regarded as provincial, and their Lordships were in their treatment dealing throughout with a matter which in the nature of things should be expected to fall under Dominion control. No doubt it may be contended that in their decision they were virtually reading a new power to deal with aerial navigation into the constitution; but this piece of judicial legislation commends itself on broad grounds, however difficult it may be to ignore the strength piecemeal of the contentions adduced against the decision now reached by the Privy Council.

The Restriction of Dominion Power over Insurance.—If the preceding case shows the readiness of the Privy Council to find a means of placing under Dominion authority the control of national issues in Canada, the decision in *Attorney-General for Quebec* v. *Attorney-General for Canada*[1] is a signal demonstration of the determination of the Privy Council to preserve unimpaired the control of local matters to the provinces. The decision turned on the effort by the Dominion to claim control of insurance business by the device of legislation framed in part under its authority as to criminal law, in part under its powers to deal with aliens and immigration. One might have hoped that the Dominion would have yielded to the force of reasoning in *Attorney-General for Canada* v. *Attorney-General for Alberta*,[2] and *Attorney-General for Ontario* v. *Reciprocal Insurers*,[3] and have accepted its inability indirectly and artificially to control a field which belongs to the provinces. It is now laid down that it is impossible to use the power to regulate aliens to intermeddle with the conduct of insurance business which, as the case of 1916 proved, is essentially

[1] 48 T.L.R. 73.

[2] [1916] 1 A.C. 588.

[3] [1924] A.C. 328.

provincial. The Dominion may forbid aliens to enter Canada, or may require them to take out a licence to do any business, and may regulate their actions in Canada, as, for instance, by imposing the duty of periodic reporting. But that is all, and the immigration power similarly cannot be used against British immigrants so as to regulate for them a provincial matter. The decision also condemns as invalid the legislation of Canada taxing insurances effected with persons or companies not licensed by the Dominion. It was admitted that the taxing power was general, but in the special case it was founded on the illegitimate supposition that a Dominion licence could give authority to transact business, and, that being a chimera, the taxation rested on a false ground and could not stand. This is a very interesting corollary and goes very far in interpretation according to the spirit, not letter.

The Land Claims of Saskatchewan.—Little surprise need be felt that the Privy Council has had no great difficulty in disposing of the claim of Saskatchewan [1] to the ownership of the lands and minerals now within her boundaries for the period before September 1, 1905, when the province came into existence. The claim is one hard even to understand, and *prima facie* untenable, for obviously it was difficult to see how a new entity such as a province could have any right to property which was not derived from its constitution, and in fact the Dominion, when creating the province, retained the control of the lands and minerals, on the broad ground that it was in the interests of the Dominion as a whole that land policy should be left in the hands of the central government pending the development of the province. The ownership of the land outside the old colonies remained vested in the Crown so far as it had not granted away its rights, as it did in the case of the Hudson Bay Company's territories; when it was decided to secure the transfer of the lands of the Company and of the rest of the area to Canada, the Dominion was given ownership, and this it retained, to exercise it in the interest of the Dominion and not merely of the scanty population then scattered over the Hudson Bay territory and the North-Western territory. The issue indeed was virtually disposed of in *Attorney-General for Alberta* v. *Attorney-General for Canada*,[2] when it was decided that lands granted in that province before or after its creation in default of heirs escheated to the Crown in its right of the Dominion. The legal rights of Saskatchewan and Alberta alike are derived from their constitutions and from the surrender of control now made under the British North America Act, 1930.

Criminal Fines as Royalties.—A very interesting point has again been decided on the apparently insoluble issue of the meaning of royalties in s. 109 of the British North America Act, which assigns them to the provinces. The claim was duly made for Ontario in *Toronto Corporation* v. *The King* [3] that the proceeds of fines imposed in the criminal courts thus should be paid to the province, and not, as directed by a Dominion statute, dealing with criminal law, to the municipality of Toronto in respect of its bearing in some degree the cost of the administration of justice. It is not surprising that the Privy Council found little difficulty in dealing with this issue. It ruled that, if fines were royalties, they were so only in so far as they were not otherwise appropriated; in the case of the Dominion the power to deal with criminal law extended to defining the manner in which fines should be dealt with, and, as the Parliament had done so, there was nothing left on which the claim to royalties could operate. But at the same time the Privy Council was careful not to commit itself definitely to the view that royalties in s. 109 cover fines levied under the criminal law. The point is obviously a delicate one, for the control of criminal law rests with the Dominion, and a case might be made out for the Dominion right to fines if not specifically appropriated by law. In fact, of course, the recognition of the legislative power of the Dominion disposes of the issue for practical purposes.

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[1] *Attorney-General for Saskatchewan* v. *Attorney-General for Canada*, 48 T.L.R. 24.

[2] [1928] A.C. 475.

[3] 48 T.L.R. 69.

Judicial and Executive Power.—The delicate issue of the boundary line between judicial and executive power which is of crucial importance in Australia [1] has also been raised, though in a less important case in Canada in *Martineau* v. *Montreal Corporation.*[2] The issue there was based on the requirement in s. 96 of the British North America Act that judges of the superior, district and county courts in each province must be appointed by the Governor-General, and on this score exception was taken to the action of the Quebec Public Service Commission in deciding compensation in expropriation cases from the city of Montreal. The difficulty of the question is obvious, and their Lordships were glad to be able to avoid a decision on principle. This was due to s. 129 of the Act which continued legal commissions in existence in the provinces at confederation subject to the power of amendment by Dominion or provincial legislation as the case might be, and in this instance, the issue being private rights and property, the power to alter procedure was provincial and had been duly exercised. Thus the commission was not a judicial body in the performance of its functions; compensation had never before federation been a judicial function, and the old system had validly been continued in operation, with the minor change of the mode of appointment, which formerly was exercised by the Superior Court and now rested in the hands of the Lieutenant-Governor. It is obvious from the remarks of the court that their decision in *Reg.* v. *Coote* [3] must not be considered as a definitive interpretation of the extent of provincial right to create bodies analogous to courts, and to ascribe to the province the power of appointment. The reasoning of Drake J. in *Burk* v. *Tunstall* [4] in 1890 was cited with approval, and tells in the opposite sense.

The Prerogative of the Crown.—Few more hopeless appeals can ever have been undertaken than the effort in *Abeyesekera* v. *Jayatilake*[1] to persuade the Privy Council that the Order in Council of 1928 amending the Ceylon Constitution was invalid. The Order in Council of 1923, which established a Legislative Council on a new basis, provided as usual penalties if any elected member who had a pecuniary interest in any contract for the public service sat or voted in the legislature. An action was brought by a common informer against the editor of the *Sinhalese Etymological Dictionary* on this score, and, not unnaturally, a fresh Order was issued in 1928 for the express purpose of making void any such action. The claim, therefore, was duly dismissed in Ceylon, and it was clearly impossible to expect any success in seeking to reverse that decision. But the judgment of the Privy Council is curious in its view of the royal prerogative ; it definitely states that " it would not have been competent for His Majesty, by virtue of the royal prerogative alone, to make either Order," but that he had power to do so under the legislative authority which he possessed over Ceylon by its conquest and session. It must seriously be doubted if this restriction of the prerogative to executive power is justifiable ; the true doctrine is that the King has prerogatives, executive, legislative and judicial, and to deny that the legislative authority of the Crown over a conquered territory is prerogative power cannot be supported by authority or on principle.[2] It is indeed unfortunate that we still have so much divergence as to the term ; even Lord Haldane,[3] who often was anxious for precision, styled the statutory authority given to the Crown by the Royal and Parliamentary Titles Act, 1927, a prerogative power, thus completely altering the normal acceptance of the term.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, p. 261.

[2] 48 T.L.R. 95.

[3] L.R. 4 P.C. 599.

[4] 2 B.C. 12.

Act of State in Protectorates.—A very valuable restriction of the dangerous doctrine that Act of State can be adduced as justifying the actions of executive officers in protectorates against natives, not being British subjects, is afforded by the latest decision in the interesting case of Eshugbayi in Nigeria. The substantial question which there arose was whether a court in Nigeria had any right or duty to investigate three grounds adduced by Eshugbayi to prove that the government had no legal authority to order his removal from certain parts of the territory. He contended that (1) he was not a native chief ; (2) he had not been deposed from office so that the Governor's sanction of his removal was meaningless ; and (3) that in any case there was no native custom which compelled him to depart from the area.[4] The court in Nigeria was not clear as to its right or duty to decide on these issues, but the Privy Council pointed out that " in accordance with British jurisprudence no member of the Executive can interfere with the liberty or property of a British subject, except on the condition that he can support the legality of his action before a court of justice; and it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive." Moreover, having regard to the suggestion of one judge that the matter was an Act of State, the Privy Council laid it down: "This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But, as applied to acts of the executive directed to subjects within the territorial jurisdiction, it has no special meaning and can give no immunity from the jurisdiction of the court to inquire into the legality of the act." Accordingly it was laid down that the court must investigate the issues, and that it was not necessarily bound to accept the opinion of the Governor on the issues. It may, of course, be held that the judgment is limited to subjects, but the quotation above suggests very strongly that the fact that temporary allegiance is owed would give the same protection as to subjects. It would be deplorable if persons in protectorates were unable to enforce claims against governmental officers on the plea of Act of State, and this appears to have been what the court had in its mind when it dealt so clearly with the issue, and it probably desired to dispel any misunderstanding which might have been created by earlier *dicta* of its own in less carefully considered cases.[1]

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[1] 48 T.L.R. 71. The decision in *Campbell* v. *Hall* is, of course, treated as binding ; see *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. i, pp. 126, 127.

[2] Keith, *Constitutional History of the First British Empire*, pp. 9–17.

[3] *House of Lords Debates*, vol. lxvi, p. 729.

[4] *Eshugbayi Eleko* v. *Nigeria Government*, [1931] A.C. 662, pp. 670–2.

Racial Discriminations in East Africa.—The decision in *Commissioner of Lands* v. *Kaderbhai*[2] is a very marked assertion of the inherent right of the Governor of Kenya under the Land Ordinance of 1915 to insert conditions restricting the right to bid for certain lots in Mombasa to Europeans. The ground of the decision was that the Crown has the right of any private owner, and can make such conditions as it thinks fit when it offers its property. The Court of Appeal for East Africa held otherwise, and there is, of course, a good deal to be said for the view that it is not open to the executive government to cut off from bidding any section of His Majesty's subjects on grounds of colour alone. Indeed, it is clear that any discrimination on colour grounds must be authorized in the most formal manner by legislation if it is to be proper. Moreover, there seems a certain fallacy in the idea that the rights of the Crown are comparable with those of a private person. The Crown holds its land rights in trust for the welfare of its subjects, and it is open to argument that it must not capriciously choose out some to favour, while ignoring the rights of others. A private person may deal as he will with his own, but clearly, if the Governor had restricted bidding to any class of Europeans, his action would have been open to the most grave censure in the public interest, and it seems difficult to see how the matter is improved by the fact that the limitation of competition was based on colour. But the legal view of the Privy Council opens up serious possibilities of misuse of executive authority.

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[1] *Sobhuza II* v. *Miller*, [1926] A.C. 518. Compare *Journal of Comparative Legislation*, Third Series, vol. viii, pt. iv, pp. 289, 290; vol xiii, pt. i, pp. 126, 127.

[2] [1931] A.C. 652.

The Constitution of Cyprus.—The suspension of the constitution of Cyprus is an event which was practically inevitable in view of the clear evidence of disloyalty towards the United Kingdom exhibited by several members of the legislature. The power to suspend the working of the present system was possessed by the Crown under the legislative prerogative secured through the cession and final annexation of the territory, power to alter the constitution having been duly reserved when the legislature was created and made representative.[1] The claim of the Greek population for union with Greece is natural enough, but in view of historical facts it was clearly unwise to press for it. Cyprus was definitely offered to Greece as the price of her intervention at a critical moment in the Great War, and the King's refusal with all the losses it entailed on the allies deprived Greece of any moral claim to consideration, as M. Venizelos readily recognized when appealed to by the Cypriot malcontents. Indeed, but for his correct and cordial attitude the British government would have found it necessary to protest at Athens against the sympathy showed with persons virtually in revolt against the authority of the British Crown in the island. The outbreak was especially discreditable in the fact that several of the leaders had taken the oath of allegiance as members of the legislature, and the strong disapproval of their attitude expressed by the Imperial government was fully justified. It is clear also that the interests of the Mohammedan minority are safest under the present regime, and there is unfortunately nothing in the record of the Greek members of the legislature to suggest that they are capable of governing themselves as well as has been done in the past. M. Venizelos's suggestion that part of the island might be ceded is interesting, but there seems no adequate grounds for the action proposed, apart altogether from the interest which France has in any action of the nature contemplated.

The Round Table Conference.—It can hardly be said that the final result of the second session of the Round Table Conference gave much satisfaction to those who had hoped that it would bring the constitutional changes proposed for India into something like definite shape. The full assurances given by the Prime Minister and others that the personal contacts established were of the greatest value, and that the procedure by committees which is to be carried on will secure effective results in due course, must be regarded as the only but sufficient proof that the discussions have served a useful end. *Prima facie* they failed in the one vital matter, the settlement of the communal issue. It is hard to suppose that agreement was ever so near as has been asserted to have been the case; the truth rather appears to be that Mr. Gandhi was never prepared to surrender the fundamental principle that it must be left open for the Hindus to exercise the powers which on democratic theory belong to a majority. He sees clearly that minority safeguards mean that Indian government must be of a type quite different from British responsible government, and it does not appear that he is ready for the acceptance of a system of this kind. The refusal of the Mohammedans, when communal agreement was impossible, to discuss the vital issues of the working of responsible government at the centre rendered it impossible to make any real progress towards the settlement of that issue. The approval given by both Houses of Parliament in December 1931 to the doctrine that a measure of central responsibility must be introduced is important, as definitely setting aside the possibility of action on the basis of the Simon Report. But it must be admitted that it is very difficult to understand how responsibility is seriously to be reconciled with the reservations reiterated in the clearest terms in the Commons by the Secretary of State for India and accepted as implied in the Prime Minister's statement by that statesman himself. When the sphere of central activity is surveyed and when the safeguards for defence, external relations, including the exercise of paramountcy over the States, financial stability, internal security and minority rights are borne in mind, it is surely clear that the sphere for real responsibility is extremely limited. Moreover, it must be remembered that responsibility is not real if safeguards can be relied upon ; the Finance Minister of India must from the nature of things fail to be as effectively responsible for financial measures as a Dominion Treasurer, because he will always be subject to a certain amount of control by the Governor-General. Nor, as Mr. Gandhi insists, can autonomy exist when the control of defence rests with the Governor-General. On the other hand, the tentative suggestions of Hindu members of the Conference as to the limitation of external control would, if carried out, render such control nugatory. The fact is that the situation has now arrived when it is necessary to work out effective means of reservation of authority, and such reservations render responsibility of a very faint character. In the provinces dyarchy destroyed responsibility, as is practically recognized on all hands, and in the central government there seems hardly any hope that real reservations will permit effective responsibility, while the alternative is the creation of unreal safeguards with the risk of utter disaster.

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[1] Compare the case of Malta, *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, pp. 289–92.

The Protection of European Commercial Interests.—In one sphere the results of the Conference are definitely retrograde. The first session ended on January 19, 1931, with the fruitful recognition by the Conference of the grant to the European community engaged in trade in India of rights similar to those enjoyed by Indians in the United Kingdom under a convention based on full reciprocity. The plan recognized that the British community trading in India was not, and never could be, an Indian minority on the same basis as the Anglo-Indian community or the Parsees or the Indian Christians, and that the protection of a common citizenship, such as was suggested in the Nehru draft constitution, was not adequate nor appropriate. At the same time it was felt that to accord Indians in the United Kingdom and United Kingdom subjects in India equal and reciprocal rights would mark a definite stage in the evolution of Dominion status for India.[1] Unfortunately this promising scheme has been abandoned in favour of the outworn and ineffective system of reservations and the assimilation of the European community to an Indian minority. Whereas the original proposal covered the whole sphere of British trading rights in India, including the right of immigration, settlement, trade and the exercise of professions, the new scheme draws a sharp distinction between the British community which resides for trade purposes in India and British firms and companies which trade with India. It must be admitted that the distinction, though insisted upon, is not very intelligible, for as defined in the report the two classes are not distinguished on any clear basis. British persons and bodies trading with India are to be given reciprocity by statute as regards the right to enter and trade so long as similar rights are accorded to Indian persons and bodies in the United Kingdom. But the resident trading community is to be protected only by an omnibus clause covering all minorities, which is to forbid discrimination on the score of race, descent, religion or place of birth. It is obvious that, as a legal protection, the proposed clause has no value. It can at once be evaded by the simple plan of adopting the criterion of length of residence or of domicil. Thus insurance business might be confined to persons whose domicil was Indian or who had there resided for twenty-five years, or to companies a majority of whose directors complied with those conditions. Such a rule would be perfectly in harmony with the proposed clause, but it would nullify its intent and give legal effect to the desire to discriminate. Naturally a prohibition worded in such terms would not be objected to by Indian opinion, except in so far as Mr. Gandhi holds that any restriction imposed from without is illegitimate, but it would utterly fail to effect the aim of protecting European commercial interests. In the same way the Report contains no protection against the use of the power to penalize unfair competition which it concedes to India. But in the eyes of many Indians, and indeed of many Socialists and other thinkers, competition between large European concerns and indigenous undertakings with limited capital is *ipso facto* unfair, and legislation can be easily imagined which would in terms be free from discrimination but would in fact affect only the large European concern. Of course, the truth is that effective reservations of a legal character in this matter are practically impossible, and it may be surmised that the Report is the outcome of the feeling that this is so, but that it is necessary to allay European anxieties by an appearance of safeguarding. But the fundamental error is the effort to treat a minority, which is essentially of United Kingdom domicil, and companies registered in the United

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[1] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. I, pp. 113, 114.

Kingdom and managed by officers of United Kingdom domicil, on the basis of an Indian minority. That is a pure fiction, and in operation must work out wholly to the disadvantage of the community, if as may be feared any Indian legislature is powerfully influenced by the interests of the Indian commercial community of Bombay, which has established cordial relations with Mr. Gandhi largely in order to secure Congress support for its effort to supplant British commerce in India. There is, of course, every justification for Indian commercial activity, but what is unjust is that legislative interference with British commercial interests should be contemplated for this end, and it is unfortunate that this fact should have been so little appreciated by the Conference.

The States and Democracy.—The proceedings of the Conference have brought out more and more clearly the motives of the Princes in favouring federation. They have demanded representation in the federation in such strength as to ensure them, if at all united, a dominant voice on issues affecting their prosperity and resources, while they will secure themselves from any pressure to bring their constitutions into harmony with democratic ideals. They have made it clear that they will not be represented in the federation by elements hostile to their system of rule, and, having regard to the restricted possibility of the extension of the franchise in British India, it is clear that any federal legislature will be distinctly oligarchic in tone. This may be inevitable, but it is clear that much of the support of the Labour party in the United Kingdom for change in India is based on a fundamental lack of appreciation of the nature of the governments which it is proposed to erect in India, and to which the fortunes of the unenfranchised populace will be handed over.

The Constitution of Burma.—In pursuance of the view that Burma should be offered the right of separation from India and the enjoyment of a constitution leading up to responsible government within the Empire, the termination of the Round Table Conference saw the establishment and operation of a conference whose duty it is to make suggestions for the type of government which Burma might properly enjoy in this contingency. It can hardly be said that the proceedings suggest that the full difficulties of the situation have yet been grasped by Burmese representatives. The Shan States, which have largely been left free from legislative control by the Burmese legislature, naturally have claimed that they should not be treated as an integral part of the province, and obviously steps must be taken to secure their privileges from any effort at a policy of assimilation. Moreover, the question of protection for Indian merchants and Indian immigrants requires delicate adjustment, as also do the issue of financial relations with India, and the protection of Burma from the possibility of external aggression by land, and the probability of internal unrest as evidenced by the deplorable and largely purposeless rebellion, which has evoked lively memories of the guerrilla warfare which followed the incorporation of the territory in the Empire. It is curious but not without parallels that the Burmese are unwilling to undertake military service while enjoying operations of this irregular type, and this fact is one of the most serious difficulties to be faced in providing for the future of Burma. It involves the use of non-Burmese forces as the essential means of sustaining law and order, and every sound principle of government forbids that the control of British troops should be handed over to any government not under effective British authority. The principle has been once more affirmed in the most positive terms in the case of India, and its application to Burma is beyond all question. But this implies a stringent limitation on the powers of self-government, for it is not enough that the Imperial government should be able to control the actual use of its forces to put down civil disorder ; it is implicit that it must also be able to control internal policy at least to the extent that it will not have to face the necessity of armed operations to terminate rebellions evoked by misgovernment.

NOTES.

British Naturalization and the Treaty of Lausanne.—The Anglo-Turkish Mixed Arbitral Tribunal at Constantinople has decided an interesting point as to the effects of British naturalization in the case of a person born Turkish claiming the restitution of real property in Turkey under Arts. 65, 66 of the Treaty of Lausanne.[1]

The claimant was the wife of a Turk who had been naturalized in England in 1913. The certificate of naturalization contained the restriction that "within the limits of the foreign State of which the applicant was a subject he shall not be considered as a British subject unless he shall have ceased to be a subject of such foreign State in virtue of its laws or of a Treaty."

This restriction, as the court pointed out, was clearly made in view of the conflict of laws which might result from the fact that under the law in force in Turkey, Turkish nationals were not free to acquire a foreign nationality without the authorization of their Government. In this case the claimant's husband had not been granted any such authorization. It was contended on her behalf that the benefits of Art. 65 of the Treaty of Lausanne extended to all subjects of the allied powers—*ressortissants alliés*.

This contention was rejected by the Arbitral Tribunal on the ground that the term *ressortissants alliés* must be presumed to refer only to the normal cases in which a subject of an allied power enjoyed that character without any reservation.

It was not reasonable to extend the benefits of the Treaty to the exceptional cases in which naturalization had been accorded only under certain conditions which were expressly laid down in order to protect the interests of the applicant's native country and to preserve the bond which attached him to that country.

Sovereignty in Mandated Territories.—Professor Quincy Wright, of the University of Chicago, writes: "I was much interested in Professor Keith's comments on my book about mandates.[2] I think he dealt with it very fairly, though I am unable to agree with his interpretation of the opinion of Chief Justice Innis in the case of *Rex* v. *Christian*. Chief Justice Innis said, 'It cannot be said that the government of South West Africa is possessed of *Majestas* in the full sense of the term; in other words, it is not a sovereign and independent state, but *Majestas* operating internally may by our law be sufficient to found a charge of high treason in spite of the fact that its external operation is considerably contracted and where the internal characteristics of sovereignty are present; where a community is organized under a government which has the power of making laws and enforcing them, this *Majestas* adequate for the above purpose must reside either in the government of the community or in some other government to which it is subject.' I concluded from this that Chief Justice Innis did not regard the mandatory as sovereign. I understand from Professor Keith's comment that he assumes that the lack of external sovereignty flowed from the Dominion status of South Africa. It does not seem to me that Chief Justice Innis was considering this question at all when he asserted that the government of South West Africa is not fully sovereign. The context of his statement indicates that he was discussing limitations based upon Art. 22 of the Covenant, not upon the qualified international status of South Africa. As I point out on p. 425 of my book, in this context Chief Justice Innis had discussed Arts. 119 and 22 of the Treaty of Versailles with the conclusion that 'renouncement in favour of' is not equivalent to 'cede to,' in view of Art. 22. 'The animus essential to a legal cession was not present on either side.' Thus he concludes, 'there was no cession of the German possession to the principal powers; there was merely renunciation in their favour in order that such possessions might be dealt with in terms of the Covenant.' It is the terms of the Covenant which Chief Justice Innis seems to think constitute a limitation upon the sovereignty of the government of South West Africa.

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[1] *Affaire* No. 66, Christine Balthazar Agopian against the Turkish government.

[2] *Journal of Comparative Legislation*, Third Series, vol. xii, p. 311.

"It is, of course, clear that external sovereignty is much more important in determining international status than internal sovereignty. The states of the United States, for instance, have almost complete internal sovereignty, and can punish for treason against themselves, though they have no international status at all.

"It is, of course, true that the Union of South Africa has occasionally asserted sovereignty over the mandated area, but such assertions have always been vigorously denounced by the Mandates Commission, and the views of the Commission were definitely accepted in the resolution of the Council of September 8, 1927. South Africa itself acquiesced in the latter resolution as reported in the official journal, vol. ix, p. 709. This controversy is discussed on pp. 446 and 447 of my book."

The Gold Coast (Northern Territories) Marriage of Mohammedans Ordinance, 1931.—S. 4 (1) of this Ordinance begins as follows: "The Chief Commissioner may grant a priest's licence to any Mohammedan priest applying for the same." The words "Mohammedan priest" are a contradiction in terms, since the idea of priesthood in any shape or form is repugnant to Islam. True, the religious teachers of that faith have often arrogated to themselves powers over their flocks at least as great as any priest ever claimed: so did, *e.g.*, John Knox in Scotland and the Presbyterian divines of the Commonwealth in England. True, also, the Islam of the Northern Territories is not altogether free from a suspicion of pagan ingredients, and it is possible that *limamis* and *mallims* may move in an aura derived from the fetish worship which they have supplanted. This is an obscure question on which, in the neighbouring French territories, diametrically opposite opinions have been held by competent observers. But it is to be regretted that a public enactment of a British government should contain even a word likely to encourage potentially bigoted and turbulent men in claiming prerogatives which their faith does not accord them. The slip is all the more remarkable in that the true functions of the learned man who attends Mohammedan weddings have been correctly apprehended. Those functions, of course, are notarial, not religious, even though prayers may be said; and accordingly the ordinance correctly speaks of "certifying the validity," not of "performing" the marriage. In all fully organized Moslem communities this is and always has been a duty of the Qadi, not the Imam. The same slip also occurs in the Ceylon Muslim Marriage and Divorce Registration Ordinance, 1929, where it may perhaps be traceable to Dutch models; for the Dutch, having made the mistake in 1760, before their knowledge of Mohammedan law became scientific, have never officially corrected it. But the general policy of both the Ceylon and the Gold Coast Ordinances should be strongly welcomed.

Other points of interest in the ordinance are the failure to make any provision regarding mixed marriages, the functions of the woman's *wali* and witnesses in case of divorce, and s. 9, giving legislative sanction to the Mohammedan Law of Inheritance. As regards the first, presumably the need for legislation on the subject has not yet arisen in the Northern Territories: when it does so, there is a wealth of precedents in the legislation of other colonies to choose from. As regards the latter, it looks as if local custom made divorce a much less one-sided affair than it normally is in backward Mohammedan territories. According to the strict letter of the law, neither the woman's *wali*, nor anybody else on her behalf, is a necessary party to a divorce, and the Qadi's functions as conciliator only come into play when the woman is the aggrieved party. Here the presence of "the woman's *wali* and witnesses" is taken for granted, and one may infer that even before the ordinance the practice was in all cases to go to the person whom the ordinance calls a "priest" for advice or conciliation. If so, this is in accordance on the one hand with Qoran IV, 128, and on the other with the primæval and world-wide sentiment by which a marriage is a treaty of alliance between families, not a mere contract between individuals, and, as such treaty, is only to be denounced by diplomatic methods.

S. 8 declares that no marriage or divorce shall be valid without registration: a more sweeping reform than any other British territory has yet ventured upon. The doctrine of *fasid* marriage, however, is not touched by this section: nor that of acknowledgment. It will still be possible (and rightly) for children to be legitimate whose parents' marriage takes place after but is not registered under the Ordinance; and it will still be possible to establish a presumption of legitimacy, though not of *sahih* marriage, by solemn acknowledgment. S. 9 applies the Mohammedan law of succession to the property of a Mohammedan married under this ordinance. What is the law where he is not so married—*e.g.* where he was married before the Ordinance took effect? And does the phraseology of this section exclude such local customs, if any, as may have currency in derogation of *sharia* rules? Probably it does.

S. V. FG.

State Intervention in Civil Proceedings in France—Le Ministère Public.—English readers of French reports, a class of persons not large but, we think, increasing, are sometimes a little puzzled in finding in the report of a civil action between private persons the formula *le ministère public a été entendu en ses conclusions.*

We have, of course, nothing which really corresponds to the *ministère public* and, except for the powers of the King's Proctor in divorce proceedings, are not familiar with the idea of intervention on behalf of the State in private suits.

To all the civil courts in France, from the *Cour de Cassation* down to and including the *tribunaux de première instance,* there are attached officials of the *ministère public,* but this is not the case with the *tribunaux de commerce.*

In penal matters the *ministère public* or *parquet* conducts the prosecution, and there are certain civil matters in which the *ministère public* may appear as a party, or, to use the technical expression, the *ministère public* is here *partie principale.* It is not with either of these cases that we are now concerned. We are speaking here only of the cases in which the *ministère public* intervenes in a civil case in which he is neither plaintiff nor defendant for the purpose of stating his opinion upon the issue and advising the court as to what should be its decision. His opinion thus given is called his *conclusions,* and he is said to proceed *comme partie jointe.*

Professor J. Perroud, of Lyons, has been kind enough to send us the following note on this matter.

" The *ministère public* was first introduced into France by the canon law. In the bishops' courts of the Middle Ages, presided over by an ' official ' and therefore designated as *les officialités,* there was a personage called *le promoteur,* and he is the ancestor of the *ministère public* whom we find at a later period in the Royal courts."

As regards his intervention in private suits at the present date, Professor Perroud writes: " He may appear before a civil tribunal or a court of appeal as *partie jointe.* He addresses the court after the arguments by the parties to give his opinion to the court by way of advice. In principle he is free either to express an opinion or to keep silence.

This principle is subject to exceptions of two kinds. The *ministère public* is obliged to give his opinion either by effect of law in a certain number of cases limitatively fixed, or, in consequence of the invitation to do so, which may be addressed to him by the court (*Code Proc. Civ., Art.* 83, *in fin.*).

This Art. 83 of the Code of Civil Procedure enumerates seven cases in which the *ministère public* is obliged to give his "conclusions":

1. Cases involving public order or good morals, the State, public lands, the *communes, établissements publics* [1] and gifts or legacies for the benefit of the poor. 2. Cases concerning status or guardianship. 3. Pleas to jurisdiction. 4. *Règlements de juges.*[2] 5. *Prises à partie.*[3] 6. Actions of married women without the authority of their husbands, or even with such authority when the action relates to their *dot* and they are married under the dotal system; actions of minors and in general all actions in which one of the parties is defended by a curator. 7. Actions concerning or interesting persons presumed by law to be absentees.[4] It is to be observed that the enumeration given in Art. 83 is not complete. There are numerous separate laws relating to special matters by which the intervention of the *ministère public* is made obligatory in cases arising thereunder.

Not only must the *ministère public* express his opinion when this is required by law, but it is also necessary that the judgment should expressly state, on pain of nullity, that he has given his opinion. In fact, in all judgments we find the formula *le ministère public a été entendu en ses conclusions.*

It is settled by the jurisprudence that the fact that the *ministère public* has said *Je m'en rapporte,* that is "I leave it to you," is a sufficient expression of his opinion to satisfy the law. The courts have thus deprived this law of all practical utility. The only effect of it which remains is to allow a judgment to be annulled if out of carelessness it has been omitted to state in the judgment that the *ministère public* gave his *conclusions.*

In practice the *ministère public* seldom gives *conclusions* in civil cases in the *tribunaux* or the courts of appeal. He does so only if the case is of special interest either by reason of the novelty or the difficulty of the questions raised or of the importance of the personality of the parties or of the interests at stake. Before the *Cour de Cassation* the *ministère public* always gives his *conclusions* and always gives them in a serious way.

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[1] These are certain institutions of public utility such as *hospices, bureaux de bienfaisance,* etc., to which moral personality has been granted. (See *Berthélemy, Droit administratif,* 11th ed., p. 638.)

[2] These are decisions by a superior court to determine which of several courts is to try a case when there is a conflict of jurisdictions. (See *Japiot, Traité Elémentaire de Procédure civile,* n. 837.)

[3] This is the special form of action which may be brought against a judge for damages caused by him in his judicial character to the plaintiff. (See *Code Proc. Civ., Art.* 505.)

[4] See *Code Civil,* Arts. 115 *seq.*

His opinion has great practical weight and it is relatively rare for the *Cour de Cassation* not to follow it.[1]

Specific Performance in France. Astreintes.—From the chapter on civil law by Professor Jean Dabin of Louvain in the volume *Belgique*, of the series *La Vie Juridique des Peuples*, which is reviewed in this issue we learn that the Belgian courts now firmly refuse to adopt the French theory of *astreintes.*

There have been, as is natural enough, some fluctuations in the Belgian decisions, but in Belgium a critical attitude was taken up from the beginning towards the French practice in this matter.

The Belgian reports, so elegantly styled *Pasicrisie Belge*, are not available, or it would be interesting to see the grounds of the judgment of the Cour de Cassation in 1927 which is cited by M. Dabin.

In France the practice of imposing *astreintes* is now so firmly established that there is not the least likelihood of its being abandoned. It is one of the most remarkable illustrations which we know of judicial legislation. The court may order a defendant to perform his obligation specifically within a certain delay, and may add that, if he fails to do so, he shall be liable to pay a sum of so much a day (or other unit of time) until he complies with the order. The creditor, however, cannot claim the *astreinte* till the court gives a second and final judgment. If the debtor continues obstinate, an application may be made to the court to increase the amount of the *astreinte*, and this process may be repeated till the debtor's resistance is broken down.

When this happens the court does not necessarily compel the debtor to pay the whole sum for which the first judgment made him liable. They may reduce the amount to such a sum as will compensate the plaintiff for the loss caused to him by the delay. A more effective way of dealing with a recalcitrant debtor can hardly be imagined.

Examples of *astreintes* can be found in the books from 1809 downwards. But in the early period the method is rare, and when it is used, it is generally to enforce a legal duty and not a contractual obligation. When a wife left her husband an *astreinte* was found a convenient way of prevailing on her to return, and it caused less scandal than having her brought back by the police.

And the method proved equally efficacious to induce a husband or a wife against whom a decree of divorce or of separation had been pronounced to surrender the custody of a child. In one famous case of this kind a lady held out till the bill for the *astreinte* came to over a million francs. Examples of *astreintes* in questions of custody of children are no longer likely to occur, as the law of 1901 makes it a penal offence to disobey the order to deliver the child.

But in modern times the enormous practical convenience of the method of *astreintes* has led to it being employed in cases of the most various nature and by way of enforcing contractual no less than legal duties.

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[1] Translated by the editor. The notes are by him.

The courts had invented the method, and who could say to them, "Thus far shalt thou go and no farther"?

One of the most famous instances is the case in 1897 between a Paris hotel-keeper and an electric light company. The hotel-keeper refused to pay his bill on the ground that he was entitled to a reduction, whereupon the company cut off the current. The hotel-keeper brought an action and the company was ordered by the court to restore the current on pain of an *astreinte* of 100 francs a day after the time fixed. The company was obstinate, and the hotel-keeper applied again to the court, which this time fixed the *astreinte* at 10,000 francs a day. This produced the desired effect.

By the method of *astreintes* the old adage *nemo potest praecise cogi ad factum* has come to mean very little unless we say that a man who is threatened with a penalty of so much a day, and knows that this sum may be increased indefinitely, is not *praecise coactus*. All that is left of the old rule is that a man cannot be compelled to do what is physically impossible nor, in some cases, to undo what has been done. "Not heaven itself upon the past has power."

But where do the courts get their authority to issue judgments of this kind? No one as yet has given a satisfactory answer. One eminent writer—Professor Esmein—put up the best case possible. But his arguments really amounted to saying that the courts can do anything in connexion with a suit. Almost without exception the French *doctrine* has condemned the system of *astreintes* as being mere arbitrariness. The courts may no doubt award damages and may take a generous view as to the amount. But the *astreintes* are not damages. Such orders may be issued even though no damage has been suffered, and when damage has been suffered, the amount of the *astreinte* is not measured by that damage.

An *astreinte*, as the writers have now come to recognize, is a form of execution upon the property of the debtor.

And what can be more illegal than for the courts to levy an execution —and that for an amount which it is entirely in their discretion to fix— without having any law behind it?

Then, again, the practice of varying the original judgment according to subsequent events seems to be in flat contradiction with one of the fundamental principles of the French law that when a court has pronounced a judgment, it cannot touch it again.

But these criticisms and others, though urged in the strongest way by writers of high reputation, have been no more heeded by the courts "than the sea's self might heed a pebble cast."

It may well be asked why the legislature has not stepped in to legalize the practice.

But, in spite of the pullulation of laws, the legislator in France, as in England, is very slow to remedy the defects of the law.

F. P. W.

Legal Bibliographies, French and English.—Students of French law have acquired quite recently a most admirable bibliography which was reviewed in our volume for 1928. It embraces not law only but political science, political economy and sociology, altogether a very wide field, and it is kept up-to-date by an annual supplement.[1] We can find in this work references to the books and the *thèses* published since 1800. The information about the *thèses* is more useful than some people suppose. No doubt many of them have served their turn in enabling the writer to obtain his doctorate and do not claim to be of much permanent value. But this is by no means true of all of them, as is shown by the fact that not a few of the *thèses* are continually cited in the books.

M. Grandin's bibliography covers foreign books written in French but not works in other languages. This is, of course, a pity, as the literature on French law in German, English and other languages is quite considerable. But it is easy to understand that it was impracticable to include foreign works, information about which might in many cases not be easily accessible in Paris.

We have now a very useful adjunct to " Grandin " in a work prepared under the direction of Professor E. M. Borchard of Yale by Professor G. W. Stumberg of the University of Texas.[2] It is one of a series of such " Guides " to foreign laws published by the Library of Congress. Those which have preceded it are a bibliography of international and continental law, a guide to the law of Germany, a guide to the law of Spain and a guide to the laws of Argentina, Brazil and Chile.

These Guides are not exactly bibliographies, though they contain a great deal of bibliographical matter. They give a general introduction to the law, with a short sketch of its history and information as to the reports. Afterwards, under separate heads, such as civil law, commercial law, workmen's compensation, railroads and so forth, we have brief indications of the law, and references to the principal books on the subject with short appreciations of them.

For the foreign student who wants to discover where to find the French law on a particular matter this guide will be extremely convenient. Professor Stumberg, who obtained a fellowship which enabled him to spend a year in the preparation of this work, has made excellent use of his time.

Is it not possible that we in England might follow such good examples? The Society of Public Teachers of Law made a beginning with the bibliography of the English law of property, which appeared in this Journal and has been reprinted.[3] But that covers only a corner of a large field. The society has a wealth of legal talent at its disposal. Could it not apportion the work and produce a bibliography of English law before we are anticipated by enterprising foreign friends ?

[1] Third Series, vol. x, p. 344.

[2] *Guide to the Law and Legal Literature of France*, by G. W. Stumberg, Washington, D.C. (Government Printing Office.) Pp. 242. Price $1.25.

[3] Third Series, vol. xiii, p. 91.

M. Grandin's plan of taking the year 1800 as a starting-point has much to recommend it. It is the contemplation of the long history of English law which strikes terror. But the old authorities are referred to in the legal histories, and what is wanted first is a bibliography of the modern law. Reduced to these proportions the preparation of a bibliography of English law presents no insuperable difficulties.

F. P. W.

Miscellania Patxot.[1]—This Miscellany may be the first of a series. It contains twenty-three articles on different matters with which public international law is concerned, and these articles are by as many distinguished European authorities. These are chiefly in French. Any students who are interested in Catalán will find eleven articles in that language.

W. A. B.

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[1] Published by the Libreria Verdaguer Rambla del Mig. 5, Barcelona, 1931.

NOTICES OF BOOKS.

THE CONSTITUTION OF THE EMPIRE.

It is the aim of Mr. H. Hughes, in his thoughtful and learned, yet lively, study of *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations*,[1] to prove that national sovereignty demands that legal disputes arising within a Dominion should be decided finally by its courts without recourse to any external authority. It is certainly unnecessary to question this principle. It has long since appeared clear to me that the only alternative to the surrender of the appeal to the Privy Council lay in Mr. J. Chamberlain's suggestion of the creation of a true Imperial Court of Appeal which would focus the legal talent of the whole Empire for the final decision of issues from all its parts, including the United Kingdom. This suggestion, which received the support of minds so diverse as those of Lord Haldane and Mr. Hughes, has failed to win wide acceptance; in the long run the dominant consideration is that appeals should be decided as rapidly and as cheaply as possible, and this demands a local court. Other arguments against the appeal have less weight. Mr. Hughes cannot really think that the Lord President of the Council or ex-Lord Presidents sit to decide judicial appeals (p. 105) and, if no dissenting or supporting judgments are given, that is because the Dominions have deliberately decided against such judgments. Moreover, if the court is not representative of the Dominions, that is partly because the Dominions do not care to pay their judges as a rule for sitting thereon, and the Free State has shown no desire to have a judge of its choice on the Council. But it must be admitted that the Council has defects of a serious character, though we need not reckon the power deliberately to revise an old decision as necessarily a defect. Its attitude in granting special leave to appeal is far from easy to justify on grounds of consistency, and it is impossible to regard as proper a system under which an appeal can be permitted,[2] and months after the Council can rule that the appeal was incompetent, when the same facts and arguments were before the Council on both occasions; nor should months elapse between hearing and decision. How far decisions are based on political rather than legal considerations is open to dispute, but it must be admitted that Mr. Lapointe has asserted that such a feeling exists in Canada, and it is certainly hard to reconcile with legal principles the famous decision declaring the Senate of Canada[1] open to women. But here again it might be argued that a court is none the worse for being able to advance with the times.

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[1] *National Sovereignty and Judicial Autonomy in the British Commonwealth of Nations.* (London: King, 1931.) Pp. xv + 184. Price 9s.

[2] *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, p. 289.

If, however, disputes should be determined in the Dominions, then Mr. Hughes is certainly right in insisting on the necessity of the utmost care being taken to provide final courts of appeal which by reason of the character of their members will ensure confidence in litigants. Mr. Lapointe has made the same point as regards Canada, and it is common knowledge that owing to a variety of causes the courts of the Dominions inspire less confidence than is desirable. This fact is in part due to the existence of the appeal to the Privy Council, and in part gives cause for desiring the continuance of the appeal. There are many temptations to make political appointments; the Labour government in the Commonwealth in 1931 obviously was motived in its selection of new Justices of the High Court by political considerations, a fact not unknown even as regards that most august of tribunals the Supreme Court of the United States, or the English courts. Mr. Hughes justly insists (pp. 126–9) on the necessity of encouraging a vigilant legal and public opinion to counteract this undoubted danger.

On the issue of the appeal from the Free State, Mr. Hughes naturally enough hardly sees the full force of his opponents' arguments. The first point is simply whether the treaty of 1921 implies the right of appeal. This might be disputed, but for the fact that the Irish constitution embodies it, and that this inclusion was demanded and conceded because it was held to be implicit in the treaty. But for this it might have been argued that the appeal in Canada rested essentially on the federal character of the constitution, and therefore was as inapplicable to the Free State as the inability to change the constitution which is characteristic of Canada, but was not held to be applicable to the Free State. As, therefore, the appeal is implicit in the treaty, the second question is whether it implies any obligation on the Free State to allow the appeal to have the normal results or whether it is entitled to legislate so as to render the actual hearing and decision of the appeal profitless to the appellant. On that subject opinions will differ; in 1922 I noted that the mere right to appeal might not mean anything because of the power in non-constitutional issues to nullify it, as the Free State has in practice done by legislation. But that leaves the appeal on constitutional issues intact, and prior to the Statute of Westminster it seems hard to hold that the Free State had any legal power to prevent the appeal being operative. In fact, of course, the Free State refused to give effect to the decision in the case of the transferred civil servants,[2] and on the whole it may be feared that this was a definite breach of a binding obligation, even though the special circumstances of the case may excuse in part its attitude. It will be remembered that the parties to the treaty agreed that it had not the sense which on legal construction as applied to statutes as opposed to treaties the Privy Council felt bound to give to the compact. Now that the Statute is operative, the right of abolition of the appeal appears in a new light. But, assuming that it can legally be abolished, there remains obvious the necessity of the Free State and the United Kingdom agreeing definitely on a system of inter-imperial arbitration to decide differences arising *inter se*, just as they accept the jurisdiction of the Permanent Court of International Justice in matters affecting their relations with foreign powers.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xii, pt. i, pp. 101, 102.

[2] *Ibid.*, vol. xi, pt. i, pp. 129–31.

Another aspect of the growth of Dominion nationality is dealt with by Dr. E. F. W. Gey van Pittius[1] in his discussion of nationality within the British Commonwealth of Nations, or as we may briefly call it the Empire. The work includes a full discussion of the characteristics of natural born British subjects (Part I), the acquisition and loss of British nationality subsequent to birth (Part II), and in Part III it touches on dual nationality, statelessness, the nationality of married women; the relations of nationality and domicil; differentiation as practised in the Dominions between British subjects; mandates; local naturalization; and Dominion nationality. On these topics, if Dr. van Pittius has not much that is new to tell us, he tells it clearly and accurately, and his references to Roman-Dutch jurisprudence as evolved in South Africa are often apposite. It is suggested, for instance (pp. 40, 41), that a child legitimated, or adopted, or posthumous and born out of the Empire of a British mother, will be regarded as a British subject in the Union, and should be so regarded throughout the Empire. This is an interesting speculation, but hardly one ever likely to be definitely decided; it must, however, be regarded as very dubious if English law would accept this suggestion.[2] Again, we are told (p. 35) that the child of a British subject, if born in a place where the Crown exercises territorial jurisdiction, is a British subject. This, however, is clearly erroneous[3]; birth within a place where the Crown exercises territorial jurisdiction has no effect whatever in conferring British nationality; the point of such birth is that it confers on the child of a British subject the right to transmit British nationality which is normally lost by birth on foreign territory. Under the Act of 1914, if A is born in England, his son B born in France is himself a British subject, but his son C, though born in Egypt, is not such a subject. If, however, B were born in Egypt, he would by that fact be able to transmit to C, whether born in Egypt or in France, British nationality. It must be added that the author here errs in excellent company, and that it is unfortunate that the Act should be so badly worded. On the issue of *renvoi* again the author has unluckily (p. 157) accepted the suggestion of Russell J. in *Annesley, In re*,[1] as representing the present trend of English law; in fact the suggestion there put forward has been rejected by two other judges in *Ross, In re*,[2] and *Askew, In re*.[3] The present English doctrine is simply that, when English law holds that a testator or intestate dies domiciled in any foreign country, it will apply to the will or the devolution of the estate the rules which the courts of that country would apply. It seems impossible to condemn so simple a doctrine[4]; if a man makes his home in a foreign country for good, he may well be assumed to desire that his property on death should be ruled by the law which it thinks fit to apply, whether it be that of his nationality or the local law. Dr. van Pittius justly insists (chap. xiv) that nationality alone is insufficient as a basis for settling issues of status, and that domicil also must be involved, but it may be admitted that so far international efforts to arrange an intelligible system have utterly failed, even as between nations which rely on nationality as the test. On Dominion nationality reference may be made also to the author's article in this Journal.[5] The whole system is still in a transitory state, and the legislation of the Irish Free State on this head must be awaited to see whether any effort will be made to subtract Irish citizens from British nationality. Canada and the Union have not hitherto sought to deny the inclusion of their nationals in the wider circle of British subjects. The issue as regards treaties and the rights of Dominion nationals abroad does not fall within the sphere of the author's useful and interesting treatise.

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[1] *Nationality within the British Commonwealth of Nations.* (London: King, 1931.) Pp. xvi + 238. Price 10*s.*

[2] *Cf.* Dicey and Keith, *Conflict of Laws* (1927), p. 166.

[3] *Journal of Comparative Legislation*, Third Series, vol. xi, pt. iv, p. 267.

A. Berriedale Keith.

ONTARIO MORTGAGES.

The second edition of the well-known work on Mortgages[6] of the present Dean of the Osgoode Hall Law School has now made its welcome appearance. Inasmuch as the first edition was published exactly twelve years ago (1919), and inasmuch as the book, though primarily concerned with the Law of Ontario, deals largely with matters which are important through all the Common Law countries of the British Empire, English lawyers will be interested in it. And they will find it a pleasure to read; for it is succinct, pithy, and, so far as we have been able to judge, accurate. Naturally, the passages which deal with the provisions of the various Land Titles Acts of the different provinces of the Dominion (Ontario, Manitoba, Saskatchewan, and Alberta) and of the Territories will be of only minor interest to them; but the Canadian Land Titles Acts have, apparently, many points of similarity to the English Land Registration Act. And so Dean Falconbridge's treatment of them will not be without its uses for English readers.

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[1] [1926] Ch. 692.

[2] [1930] 1 Ch. 377.

[3] [1930] 2 Ch. 259.

[4] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, p. 303.

[5] *Ibid.*, pp. 199–202.

[6] *The Law of Mortgages of Land, including Mortgages or Charges under the Land Titles System.* By John Delatre Falconbridge, M.A., LL.B., K.C. (Toronto: Canada Law Book Publishing Co. Ltd., 1931). Pp. lxxix + 807.

Part I of the book, mainly historical, describes briefly the origins and development of the fundamental principles of the English Law of Mortgages, both on its Common Law and its equitable sides, together with the introduction of the English Common Law into Upper Canada in 1792. It is interesting to note that, although the statute of 1792 expressly introduced the "laws of England," it was not deemed to apply English equitable principles, and that, until 1837, mortgages of land in Ontario were governed by Common Law rules only. The various inconveniences (both to mortgagee and mortgagor) from this partial adoption of English law are a tribute to the valuable work of Lord Nottingham and his successors in the English Court of Chancery. Since the statute of 1837, the general doctrines of English law have applied in Canada, save, of course, where they have been altered by Dominion and Ontarian legislation.

After Part I, Dean Falconbridge drops the historical for the analytical method, and deals with the Law of Mortgages of Land in a succession of topics—priorities, persons claiming under the mortgagee and mortgagor respectively, enforcement of mortgages (foreclosure, sale, and redemption), mortgage accounts, statutory and contractual rights, and supplementary. The subject of limitation of actions, as it applies to mortgages, is dealt with under the head of Enforcement of Mortgages; and, under each head, the relevant provisions of the Land Titles Acts are treated. This method, though not, apparently, very scientific, will be found, in fact, to cover the ground in a convenient and comparatively brief way, allowance being made for the inherently difficult nature of some of the topics. The work concludes with a chapter on the Conflict of Laws as it applies to mortgages.

The chapter (XXX) dealing with the limitation of actions may be referred to as perhaps the most thorough and satisfactory of the book. Owing to the ambiguities of the English law on the subject, and the piecemeal way in which that law was introduced into what is now Canada, the topic is one which any English lawyer acting, for example, in a claim to land in Canada, finds peculiarly difficult; and the chapter should be of great use to him. Incidentally, Dean Falconbridge does not fail to point out, what most English text-books ignore, that there is no general law of limitation of actions applicable to recovery of pure personalty, and that no title to such interests can be acquired by long possession. If the claimant can manage to evade the out-of-date provisions of the English Limitation Act of 1623, there is no time-bar to his recovery of pure personalty, though he and his predecessors in title have been out of possession for centuries. That this result was contemplated by Parliament is unbelievable. It is simply due to the chaotic character of our legislation on the subject. It is, therefore, not surprising to find that in Canada, as in England, a re-casting (and, it is hoped, an amendment) of the statute law on the subject is regarded as long overdue.

EDWARD JENKS.

MOHAMMEDAN LAW.[1]

The Mohammedan law, with its great volume and complexity and its diversity of "schools," does not lend itself readily to compression. On a few texts of the Qoran, serving as a foundation, there has been erected a complete and elaborate legal structure comprising a series of codes which claim to regulate rigidly and in the minutest detail the lives and the affairs of the adherents of Islam.

The diffusion of the new religion through countries outside Arabia brought its missionaries into contact with communities living under totally different conditions and confronted them with problems for which no direct solution was to be found in the sacred texts ; and so it became necessary to accumulate and record numerous traditions embodying the sayings and doings of the Prophet from which guidance was sought for the purpose of constructing a definite legal system which would serve to consolidate the temporal power of Islam in its newly-won territories. This collection of traditions was in turn subjected to a process of interpretation by a succession of keen-minded jurists who, in the course of less than three centuries, established the various " schools " of Islamic law which, while they are in substantial harmony with each other, differ considerably in many important respects. The founders of these systems did not all accept the same set of traditions, nor were they in agreement regarding the principles to be applied in construing them. For some of them the only legitimate method was a close adherence to the letter of the traditions which they favoured ; for others it was permissible to resort to philosophy and to avail themselves of the processes of reasoning (*qiyas*) in their attempts to arrive at a statement of the law. From such materials so diversely treated there emerged finally a legal system which, in spite of its intricacy of detail, compels admiration by its perfection and symmetry of structure.

But though the religion of Islam spread with amazing rapidity, and though its scheme of law soon attained to rigid maturity, it would be unreasonable to suppose that the peoples who, voluntarily or under compulsion, accepted the new creed became amenable to the comprehensive code which had been evolved in the manner above described. It is easier to change a creed than a custom, and there can be little doubt that it was never found possible, at any rate in the countries beyond Arabia proper, to apply the Islamic law in its entirety. It is certain that it was never so applied in India, even in those areas which were long under the domination of Muslim rulers. The fact is that no system of law, whatever origin be claimed for it or however immutable it proclaims itself to be, can resist the solvent action of fresh contacts and changing conditions and refuse to accommodate itself to new conceptions of human welfare and progress.

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[1] *Muhammadan Law.* An Abridgement according to its Various Schools. By Seymour Vesey-FitzGerald. (London: Humphrey Milford, Oxford University Press.) Pp. xvi + 252. Price 15*s*. net.

Where Muslim countries have come under European influence or control, the tendency has been for the Qoranic law to give way except in so far as it regulates the family concerns and religious practices of the Mohammedan populations. Much of the pure Mohammedan law has become obsolete in India since the advent of British rule, and the same thing has happened even in Turkey. The late Ottoman Empire adopted a European code in the last century and the new Turkish Republic has gone still farther in the direction of introducing a new legal system.

There remains, however, a considerable portion of the Islamic code in the personal law which still receives recognition and is practically secure against interference in the territories in British occupation, and it is this part of the law which holds most importance and interest for those entrusted with the functions of government in these lands.

Hitherto a good deal has been done to assist the study of the Mohammedan law as administered in British India, though it must be confessed that most of the text-books written with this purpose have failed to offer an attractive presentation of the subject. The book now under review is, as the author explains in his preface, addressed to a new audience, being intended for the instruction of candidates for government service in tropical Africa, where the prevailing schools of Mohammedan law are different from those followed in British India. For these students the Indian text-books are largely unserviceable, and particularly so inasmuch as Indian case law and the Privy Council decisions in appeals from the courts in India do not bind the courts in Africa. The elaborate commentaries on the systems peculiar to Africa are, for the most part, written in foreign languages and are much too diffuse and difficult for the instruction of students undergoing a short period of preparation prior to their appointment. It was a formidable task to undertake the production of an elementary treatise dealing with the doctrines of the schools in Africa and to present in small compass an exposition of their leading principles. The learned author has done his work well and deserves congratulation on the considerable measure of success he has achieved.

The major portion of his work is naturally devoted to the discussion of the various topics which fall under the head of personal law—marriage, guardianship and inheritance. His treatment of the law of marriage and kindred subjects is both lucid and adequate, but it might be well in a future edition to make it clear that the division of *talāq us sunnat* into *talāq ahsan* and *talāq ahsan* at p. 76 is based solely upon the circumstances and the manner in which one or more revocable pronouncements of the formula of repudiation are made and that the effectiveness of such pronouncements to determine the marital relation still depends upon the rules set out on p. 74.

In connexion with the law of marriage it is interesting to find that local legislation in East Africa has been active in insistence upon the registration both of marriages and divorces. This is a reform long overdue in British India.

It is the Mohammedan law of inheritance which presents the chief stumbling-block to the student, who finds himself lost in a maze of rules rendered still more perplexing through attempts to illustrate them by imaginary cases of succession involving the most remote contingencies. In this respect the author has done well not to overload his commentary with needlessly abstruse examples.

In his introduction to the law of inheritance in Chapter XIV he has given a clear and useful statement of the changes wrought by the Qoranic precepts in the older law of succession. The innovations were obviously prompted by the purpose of raising the status of women in Islam, and, though important, were comparatively few. But the expansion of the law by interpretation as understood and practised by the founders of the different schools led to the inclusion of new heirs not mentioned in the sacred texts whose claims are based upon varying conceptions of the relationship which confers a right to inherit. The refinements and discriminations resulting from this development have served to complicate enormously the scheme of inheritance and to render attempts to deal with it in an abridged form all but impossible.

Little need be said of those matters which pertain to the law of property, for this branch of the Mohammedan law is not generally recognized in the African dependencies. Those who have had occasion to administer the law of pre-emption in British India will be gratified to learn that it has failed to find a footing in Africa ; it is to be hoped it never will. It found a favourable soil in India, where the joint family ownership of property has always been a characteristic feature of the social system and came to be adopted for that reason by a large section of the population which in other respects was not subject to the Mohammedan law. But pre-emption has outlived any usefulness it ever had and has led to a grave depreciation in the value of landed property. It has also served to foster a prodigious amount of dishonest litigation which the statutes now regulating it have failed to check, and has degenerated into a pernicious system of legalized blackmail.

In conclusion we can commend this little treatise as a valuable introduction to the study of Islamic law and institutions. The author has acquitted himself of a difficult task with accuracy and lucidity, and the further contribution to these subjects which he has promised in his preface will be awaited with interest by students and teachers of the Mohammedan law.

B. L.

THE ROMAN LAW OF MARRIAGE.[1]

THE author says in his preface that his book is designed to provide English-speaking students with a concise general statement of the

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[1] *Roman Law of Marriage*, by Percy Ellwood Corbett, Dean of the Faculty of Law and Gale Professor of Roman Law in McGill University, formerly Fellow of All Souls College, Oxford. (London : Humphrey Milford, Oxford University Press, 1930.) Pp. xii, 254. Price 15*s*. net.

Roman law pertaining to marriage. The author is too modest. He has interpreted the scope of his title widely so as to include, besides marriage proper, such topics as betrothal, *dos*, *donatio ante nuptias*, divorce and remarriage. Moreover, while he devotes his attention mainly to the classical law, and does not concern himself at all with jurisprudential problems relating to the Roman conception of marriage as a legal institution, he has given us a review of all the more important results of recent research and added to them discoveries of his own. His book is therefore valuable, not merely as a summary of the law, but also as a piece of original criticism, based everywhere on a first-hand reference to the texts. His discussion of problems of the early law is particularly interesting.

But the student who desires a clear statement of the law at a definite period, in such a form that it can easily be assimilated for examination purposes, will not find it here. For the author, although he always makes up his own mind where he thinks the evidence warrants it, and states his own very shrewd opinions clearly, does not separate arguments and conclusion so that the latter leaps to the eye at all readily. His book might have made easier reading if he had reserved for the footnotes more of the evidence leading to his conclusions, or if, alternatively, he had summarized the arguments of his opponents at rather greater length in the text. As it is, exposition and argument rather get in each other's way. Whether a student should learn his Roman law without tears at all is another matter. In a topic like marriage, where the Roman law is of very little practical interest nowadays, the disciplinary value of the study is predominant ; and if the student reads this book in that spirit he will not be disappointed. He will find that it is learned and reasonable, and written in a style whose plainness is not unattractive. He will find it an adequate guide to the more detailed works on the subject. In fact, it is a book which can be unreservedly recommended to the more serious-minded student.

F. H. LAWSON.

LOCAL GOVERNMENT IN ENGLAND.[1]

A HUNDRED years ago the abuses of local government in England were just about to force themselves upon the attention of the new reformed Parliament. Fifty years later, when Sir Mackenzie Chalmers was describing our local administration, there was still a sad story to tell of the jungle of jurisdictions, the obstructiveness of vested interests and the chaos of areas, authorities and rates. Perfection is not yet attained, but progress has been made. Mr. W. Ivor Jennings admirably sketches this progress in his book on the principles of local government law. Not till 1930, he observes, was there an end to the conflict between the revolutionary Benthamite ideas of bureaucratic reform which inspired the Poor Law Amendment Act of 1834 and the traditions of historic autonomy perpetuated by the Municipal Corporations Act of 1835. He examines the influence of Disraeli (whose political thought he lately discussed in our Journal), Bentham, Chadwick and Mill, the development and organization of local authorities and the treatment of poor relief, highways, public health, education and rating. Local finance, which governs the dependence or independence of local bodies, is well explained. Central control, relaxed when the abolition of the Star Chamber freed the justices of the peace from administrative interference, is traced through its several types and stages. The Poor Law Commissioners of 1834, who have Chadwick for their secretary and guide, are not directly responsible to Parliament; but they already possess the rule-making powers now commonly enjoyed by government departments. The Poor Law Board of 1847 has a president capable of sitting in Parliament. The General Board of Health is established in the following year with Chadwick as one of its commissioners. In 1858 it hands over its powers to the Privy Council, which in turn passes them in 1871 to the Local Government Board, now replaced by the Ministry of Health. It is an interesting study in departmental growth and structure. Mr. Jennings, it may be added, has no doubt that England possesses a system of administrative law. He deals with it as part of our constitutional law and devotes a final chapter to the judicial control of local authorities.

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[1] *Principles of Local Government Law.* By W. Ivor Jennings, M.A., LL.B., Reader in English Law in the University of London. 1931. (University of London Press.) Pp. 263. Price 6*s*.

Easy to read, trustworthy and free from political propaganda, this little book will be read with profit both by university students and by others who are actually engaged in local government.

C. T. Carr.

THE ECONOMIC USES OF INTERNATIONAL RIVERS.

The author of this volume[1] (described as being No. 108 of "Studies in Economics and Political Science" by writers connected with the famous institution in Houghton Street, Aldwych) is to be congratulated on the discovery of an international subject which up to now has not received a treatment adequate to its importance, and which, as developed by him, suggests some of the main problems of international law.

After a brief and pithy introduction, Professor Smith has a chapter on "The Development of Private Law," whose principles, whether Roman law or the Common Law be our guide (and they do not seriously differ), as determining the rights of riparian owners, he rightly finds inadequate for the solution of the problem which arises when two or more states are interested in the same river, whether it forms the frontier between their territories, or whether it flows across their frontier, so that different states own the upper and lower reaches respectively of the same stream. Then follows a rapid but not inadequate survey of some fourteen "particular inter-state controversies," including in that expression controversies between States of the American Union and States of the Australian Commonwealth. This occupies nearly half of the book and gives the reader much matter of great interest which he will not readily find, even in different sources, elsewhere. After this we have extracts from eight of the main judicial decisions of inter-state controversies (five of which are from the Supreme Court of the United States, one from the Swiss Federal Court, one from the Reichsgericht, and one from the Supreme Court of Canada), and two valuable and suggestive chapters on the Function of International Commissions, and the Relation between Navigation and other Uses. Last comes a statement of general principle. The book concludes with two appendices, one being an analytical digest of Treaty Provisions and the other giving the text of the Dutch claim made against Belgium in 1856 in respect of damage to Holland caused by Belgian action. The value of the book is increased by sketch-maps illustrating the main international questions discussed.

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[1] *The Economic Uses of International Rivers*, by Professor H. A. Smith. (London: P. S. King & Son, Ltd., 1931.) Pp. ix + 224. Price 10s. 6*d*. net.

Professor Smith is both a vigorous and a careful writer, and his book is full of sound sense and of challenge to conventional complacency. The reader is never in doubt as to the writer's meaning and is never given the sawdust which falls from other people's machinery as a substitute for independent thought. The economic uses of rivers in modern times are various, and are certainly not limited to navigation. Irrigation, domestic water-supply, the disposal of sewage, the hydro-electric development of power, are all uses of the first importance, and it may even be conjectured that, in the future, recreation, which Professor Smith does not mention separately (is it included under "Navigation"?) may, in its many forms—touring, yachting, rowing, swimming—be regarded as an economic matter, supplying a need of modern humanity and thus possessing economic value both direct and indirect.

The main lessons which Professor Smith draws from his survey are:

(1) the inadequacy—especially when applied to American conditions—of the rules of private law regulating the rights of riparian owners, rules established, so far as the Common Law is concerned, in a country with an abundant water supply, where drainage rather than irrigation is a necessity, and at times when a bath even for the rich was a rare occurrence, and the value of water-power, except for turning small mills, was unknown. Equally inadequate is the facile slap-dash solution which would allow any State that sits astride a river to do what it pleases in virtue of its "sovereignty" without regard to consequences to States higher up or lower down the stream, a solution to which in 1895 an Attorney-General of the United States gave his authority though the Supreme Court has never accepted it.

(2) The limitations of law and the lawyers. These limitations result largely from two causes. One is the individuality of each river system; you cannot make rules that will apply equally to the problems of the St. Lawrence—a predominantly navigation and power river—and of the

Nile—a river whose predominant use and object of existence is irrigation. River planning is even more individual than town-planning, though perhaps both of them are branches of the now developing science of the best planning of the use and enjoyment of all the natural features of the earth. The other cause of the limited usefulness of the law and lawyers is that process of change which is the one certainly known law of the universe: new uses for water are discovered, old uses become less important, the methods of water-borne traffic change.

(3) The consequent necessity of treating each river separately and as a whole, with the object of promoting the interests of all the populations concerned, and the resultant advisability, so far as may be possible, of solving its problems by the advice of technical commissions representative of the countries interested, modelled on the experience of the American-Canadian Commission which has done admirable work on such problems of the St. Lawrence as have been committed to its care—problems which unluckily have not up to the present been allowed to include the critical case of the Chicago Drainage Diversion.

(4) The impossibility of accepting, as a rule of law applicable to all international rivers, the primacy of navigation and the subordination of all other uses. Here, and in some other respects, Professor Smith has some hard things to say about the Barcelona Convention, which indeed seems likely to prove a dead letter from the non-ratification of the States principally interested, and he is rightly critical of the views of Fauchille or his editors. Nor do the proceedings of the Institute of International Law at Madrid in 1911 escape well-merited comments.

Attractive and important as is the main subject of the book, not the least part of its value for the general student of international law lies in the indication which it gives of the author's views on some fundamental topics. He recognizes that law is a force determinative and conservative of duly established interests (p. 57), that " the main practice of courts is to define existing legal rights, but a purely legal definition of rights, unless it is supplemented by a constructive policy, is likely to result merely in the petrifying of a *status quo* " (p. 120). Hence the reader may deduce the incapacity of law to solve those political problems to which we may give the title of problems of change. He tells us that in Europe (but is it not also true of other continents ?) " there is too much history and it is remembered too well " (p. 131). " Positivists and naturalists," he writes (p. 150) " may argue for ever as to the ultimate philosophical foundation of international or any other kind of law, but it is beyond dispute that no rule, whatever may be its intrinsic merits, can be regarded as effective law until it is established by the consent and practice of states." Here presumably he does not by " states " mean " all states," and the phrase taken by itself may seem not to allow enough for the work of the Permanent Court of International Justice as expressing a consensus of informed opinion.

He includes among " justiciable disputes " the question of the existence or non-existence of a legitimate and vital interest of a State in a river, and adds (p. 151) that the question would be " suitable for arbitration, judicial settlement, or reference to the Council of the League of Nations." The reviewer is tempted here to interpolate a question whether a justiciable dispute ought ever to be referred to a political body such as the Council of the League. It seems to him rather that the true line of international organization is to induce States, by accepting an improved and redrafted Optional Clause *without reservations*, to submit all their disputes as to legal rights to a legal tribunal for final decision and to send all their political disputes—all disputes, that is, in which on one side or the other a change of rights is sought—to some body of statesmen, whether Council of the League or World Conference *ad hoc*, not, for the present at any rate, for compulsive decision, but for report and " recommendation."

A timely warning as to the dangers of premature attempts at codification should also be mentioned—a warning specially in point where the subject-matter, as in the case of the use of rivers, is in process of development.

It must be added that the Index is hardly worthy of the book ; it is limited almost entirely to geographical names, and even within that category it omits place-names not directly connected with rivers or waterways ; thus a reader who wishes to know Professor Smith's criticism of the Barcelona Convention or the Madrid resolution of the Institute of International Law, or his views on Fauchille or Attorney-General Harmon or Senator Root or Mr. Kellogg, will search the index in vain. Also, is not the author a little optimistic as to the linguistic capacities of his readers ? As the text stands, they are credited with an easy knowledge of French (*passe encore*), German (extracts from two judgments and a treaty), Dutch (four pages) and Italian (a few sentences only). But some of us are humbly thankful that Russian-Finnish treaties are not given in their original tongues.

J. F. W.

THE EGYPTIAN MIXED COURTS.[1]

THIS full and reliable account of the creation of the Mixed Courts and of their manifold and beneficent activities will be welcome, not only to lawyers and diplomatists, but to all students of political institutions.

It might have been supposed that a court composed of judges of many nationalities—they represent at present sixteen countries—and doing its work in a language which is the mother tongue of only about one-fourth of its members, would be anything but a happy family. And yet we believe that no important institution in Egypt has had such unbroken success as the Mixed Courts, and that none has done so much for the prosperity and good government of the country. It is a wonderful illustration of what can be done by a steady exercise of good sense and good feeling. If in their political and economic relations with each other these sixteen countries had during the last half century behaved as well as the judges who have represented them in the Mixed Courts the history of Europe would have been vastly different.

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[1] *The Mixed Courts of Egypt*, by Jasper Yeates Brinton, Justice of the Court of Appeals, Mixed Courts of Egypt. (London : Humphrey Milford, Oxford University Press.) Pp. xxvii + 416. Price 22*s*. 6*d*. net.

It ought never to be forgotten that the Mixed Courts owe their origin not to foreign pressure but to the heroic exertions of an Egyptian Minister, Nubar Pasha. Judge Brinton gives a vivid account of the " diplomatic battle " waged for eight years by Nubar and carried in 1875 to a triumphant conclusion, which, in Lord Milner's words, earned for Nubar Pasha " the lasting gratitude of Egypt and the respect of the civilized world." The campaign is said to have cost Egypt two and a half billion gold francs, and an account of their expenditure would make interesting reading.

Before the new courts could be established it had to be settled what law they were to apply. It was clear that new codes must be prepared. The consent of the Powers could not be obtained until they knew what the new laws were to be. In the circumstances it was a foregone conclusion that the new law for the Mixed Courts should be on the French model. The only alternative would have been the common law. But where was any compendious statement of it to be found ? And where were the continental lawyers to be found who could be trusted to administer the common law even if, *per impossibile*, the Powers had consented to adopt that system ? Whereas, many of the European States had codes on the French model, and many foreign lawyers (outside France) were familiar with the Code Napoléon and with the decisions of the French courts. Nor, in fact, is the choice of the French law to be regretted. Judge Brinton cites as to this the weighty opinion of Sir Malcolm McIlwraith, an ex-Judicial Adviser, " French law is by reason of the precision and lucidity of the language clearer in form and more congenial in substance to the mass of the inhabitants of Egypt, both native and foreign, than would ever be, in my opinion, our own uncodified, largely unwritten, more or less inaccessible and partly archaic system."

On the merits of codification the author's observations are well worthy of notice, and all the more so, as coming from an American. Those who oppose codification most eloquently have had, as a rule, no practical experience of living under codes, and gravely misunderstand the part which a code is expected to play in the administration of justice. The argument that when the law is codified it becomes too rigid is absolutely disproved by experience.

The designation of the courts was taken from the term *procès mixtes* which had been long used in Turkey. As a name for the courts it is not particularly happy, but it is hard to suggest a better. To call them international courts would be even more misleading. They are Egyptian courts, composed, it is true, mainly of foreign judges who are, however, appointed by the Egyptian government, and they administer a system of law of their own in the classes of cases as to which they are given competence. The law which they apply is in no sense international law. This book gives much information as to the manner in which their jurisdiction has been extended by judicial interpretation. Our old Chancery maxim, *boni judicis est ampliare jurisdictionem*—"a saying of a very great man," according to Sir Joseph Jekyll—has seldom been applied with such whole-hearted enthusiasm as by the Egyptian Mixed Courts. The astuteness with which they have contrived to draw into their net almost all the important civil legislation of the country would provoke criticism if criticism were not disarmed by the fact that it has all been for the general good.

French is now to all intents and purposes the only language used in the Mixed Courts, and that this will continue to be the case may be regarded as certain. To most of the non-French judges it is more familiar than any other language except their own, and it is the only language which is common to the members of the Mixed Bar, a body composed of members of almost as many nationalities as the Court itself. Perhaps the greatest disadvantage is the degree to which it limits the field of selection in the appointment of new judges, and this disadvantage is probably felt most in the Anglo-Saxon world. There are none too many English and American lawyers of suitable character and attainments willing to expatriate themselves even for a position in many ways so enviable as that of a Mixed Court judge. And among those otherwise suitable and willing only a small proportion will possess the necessary knowledge of French. And it may be observed, though the author does not discuss this point, that the scale of salaries, ranging as they do from £E1,400 to £E2,200, is none too high considering the present cost of living.

Egypt is in many respects a delightful country to live in, but since the war living there has become very expensive.

F. P. W.

DRAFTING AND FORMS.[1]

THE third edition of Sir Alison Russell's collection of legislative precedents, framed with special reference to the needs of officials who have to initiate and frame legislation overseas, contains over 500 new forms. These include a workmanlike draft of an Interpretation and General Clauses Ordinance; there are also forms and guidance in connexion with the preparation of revised editions of statutes, on which Sir Alison Russell writes with authority and experience. A slight change in the title of the book emphasizes the expansion of its preliminary general observations on drafting. They are a valuable introduction to the art or science of legislative expression (not so simple a matter as the uninitiated may suppose), and they extend even to minutiæ such as the right use of punctuation, inverted commas and capital letters. Previous editions have received official recognition by their adoption in many colonies and protectorates. This new and enlarged edition will be of even greater service.

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[1] *Legislative Drafting and Forms.* By Sir Alison Russell, K.C., formerly Chief Justice, Tanganyika Territory. 3rd edn., 1931. (London: Butterworth & Co.) Pp. 504. Price 30s. net.

THE HISTORY OF STATE CONTROL.[1]

It would be impossible to find any other volumes more appropriate to their moment of issue than these two on the history of Mercantilism in England, which Mr. Lipson has added to his well-known earlier volume on the mediæval ages. There is a useful comparison between periods of time, as well as between different countries ; and at a moment when the chief problem of Great Britain is to discover the proper manner in which to control her trade and finance, nothing could be more useful than to be told how that most important national work was done during the sixteenth, seventeenth and eighteenth centuries, which are covered by this present work. Mr. Lipson has described in these precisely documented pages the relations between the individual trader and the State since the sixteenth century, when manufacture and commerce first became a substantial factor in our national history.

This age of Mercantilism was that period when statesmen assumed, as a matter of course, that the central government must take over the public control of trade, which in the earlier mediæval period had been in the hands of the guilds and municipal councils. When the Tudor autocracy had crushed the guilds and the Catholic Church (with its ethical laws which were the basis of the industrial economics), Parliament, and the royal councils and ministers of State took upon themselves the legislative and administrative functions which had been the work of the destroyed institutions. The policy which these public authorities constructed and enforced has received the name of Mercantilism, at least on its foreign side.

The essential fact about Mercantilism was that the State asserted its right to make the private trader put the welfare of the community before his own personal advantage. Mr. Lipson has reconstructed the story of this State control as it affected every department of economic life. We are thus given a most valuable record of the manner in which the English government assisted in the development of the chief English industries of wool, cotton, silk, etc. ; then a detailed account of the manner in which the great trading corporations, such as the East India Company and the others, beginning with the Merchant Adventurers, had founded British foreign trade : though a little more space would have made the South Sea Company clearer. The agricultural system is then described, with its Corn Laws and markets, and the statutes and orders by which they were controlled. In the second volume the general laws of Mercantilism are considered in their historical order, and the problems of Tariffs, or Protection, the Balance of Trade, the Navigation Laws, and the relation of the Colonies to their mother country are set forth. Finally, the methods by which the State has interfered in finance, wages, unemployment, patents, trade unionism and poor relief—in short, it is the previous history of almost every subject which is of pressing urgency at this present moment.

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[1] *The Economic History of England*, vols. ii and iii. *The Age of Mercantilism.* By E. Lipson, M.A. (A. & C. Black. 30*s*. net.)

It is beyond the scope of these pages to begin to examine in detail the evidence here examined with such scholarly skill—much of it for the first time. Suffice it to say that it will be a revelation to those who have only at this critical moment in our history begun to consider the necessity of a national control over industries and commerce. They will find that in former periods of our history the State always assumed its right to exercise that control as a matter of course. *Laissez-faire* is discovered to be, not an old English tradition, but a comparatively recent theory invented by a self-interested group of the community. A matter of very special interest at this moment is Mr. Lipson's account of the control of the corn trade, wherein he incidentally shows that Adam Smith and the other Free Trade economists were not even accurate in their facts, and that their arguments were often palpably faulty.

This most valuable work should be in the hands of every citizen who is taking any active part in devising or administrating our trade laws at this moment of reconstruction. The member of Parliament or public speaker who has not read it has neglected the finest text-book of political science that has appeared for a long time.

G. R. STIRLING TAYLOR.

INTERNATIONAL ADJUDICATIONS, ANCIENT AND MODERN.[1]

THESE two substantial volumes are the first of a great series which will undertake the formidable task of presenting "an intelligible and fully documented report of all judicial decisions of international questions not recorded in the ordinary law reports." As Mr. Moore points out, no judicial or arbitral award can be rightly understood without a sufficient knowledge of its historical setting, and the present series, when completed, is clearly going to be indispensable to every library of international law. The documentation is, if anything, too complete, and the practical value of such records as works of reference would probably be increased if the compilers did not feel bound to include every scrap of paper, however trivial, that is to be found in the official files. In the present volumes even the expense accounts of the Commissioners are reproduced in the utmost detail from the originals preserved at Washington.

The case here recorded is that of the St. Croix River arbitration, decided by Commissioners appointed under the provisions of the Jay Treaty of 1794. The peace treaty of 1783 had laid down that the eastern boundary between Nova Scotia and the United States should follow "a line to be drawn along the middle of the river St. Croix," and the identity of this stream was the sole point at issue. The treaty had been drawn with an imperfect knowledge of the unsettled country concerned, and the rough maps of the day afforded no clear guidance. There were, in fact, two streams, either of which might reasonably have been intended by the treaty, and the choice between them affected an area of over seven thousand square miles.

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[1] Modern Series, vols. i and ii. Edited by John Bassett Moore. (London: Oxford University Press, 1930.) Pp. cxiv + 513 + 503. Price 25*s*.

The solution of this problem was entrusted to a Commission of three, and it is interesting to note that the third member was not a neutral, but an American citizen. In argument the parties relied upon the evidence of maps, documents, and conduct. The decision, which was substantially in favour of Great Britain, was fortunately unanimous. No reasons were given in the formal award, but the grounds of decision are sufficiently indicated in the arguments of the agents and in statements made by the Commissioners. Sullivan, the American agent, considered that the result "was rather effected by negotiation than by a judicial determination."

No question of international law was involved in this case, and the interest of these volumes must rather be found in the light which they throw upon historical geography and upon minor points of early colonial history. Many readers will particularly value the admirable reproductions of a series of twenty-four early maps, ranging from L'Escarbot's "Figure de la Terre Neuve" (1609) to the map prepared by order of the Commissioners and annexed to the award.

For the benefit of the lawyers Mr. Moore has prefixed a general introduction to the whole series. In this scholarly essay, which is modestly described as "Historical and Legal Notes," he contends strongly for the view that the function of arbitrators is essentially judicial. In this opinion, which is founded upon an unrivalled experience of the practice of international arbitration, Mr. Moore will command the assent of the great majority of modern students of the law of nations.

H. A. S.

PROBLEMS OF THE GERMAN-AMERICAN CLAIMS COMMISSION.[1]

DR. KIESSELBACH was the German member of the Commission appointed under the Treaty of Berlin to adjudicate upon American claims against the German government. As Professor Garner has pointed out, the effect of this treaty was to secure to the United States all the benefits of the Treaty of Versailles while releasing her from all the responsibilities imposed by that instrument, and Dr. Kiesselbach's small volume enables us to see in part how this result was achieved. The book was primarily intended for German readers, and the author tells us quite candidly that it is written "from the German point of view." Undoubtedly he represents the feelings of most of his countrymen when he says that " the 'legal' foundations of the Treaty of Versailles as such are not worthy of any comment," but he cannot expect all readers of the English edition to share this strong national bias, which clearly colours many of his comments upon the specific decisions of the Commission.

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[1] By Wilhelm Kiesselbach; translated by Edwin H. Zeydel. (Carnegie Endowment, Washington. London: Oxford University Press, 1930.) Pp. 135. Price 6*s*. 6*d*.

There was no neutral upon the Commission, and the difficult position of umpire was filled by an American citizen, Judge Edwin B. Parker, to whose impartiality and ability Dr. Kiesselbach pays generous tribute. But the personal integrity of Judge Parker could not alter the fact that the tribunal contained an American majority, with the result that, wherever American and German legal ideas came into conflict, the American view prevailed.

Dr. Kiesselbach's analysis of the cases is highly condensed, and cannot easily be understood without reference to the published text of the decisions. Broadly speaking, the cases fall into two main groups—those which decided questions of general principle and those which decided questions of the measure of damages. The most important question of general principle was that which related to the claims arising in the period of American neutrality. The Germans contended that their liability was limited to acts which violated accepted rules of international law. The Americans maintained that Germany during this period was liable for " all acts of Germany and her agents in the prosecution of the war," and this contention was sustained by Judge Parker. In effect this interpretation gave the United States the privileges of a belligerent power during the period of her neutrality.

Within the limits of a short notice it is not possible to discuss with any adequacy the decisions of the Commission upon questions of detail. Many of these are substantially the same as the problems which arise in private law, and it was in such cases that the difference between American and German legal ideas frequently proved to be of great importance. For example, Dr. Kiesselbach points out that " the idea of compensation for mental suffering, as also that of compensation for moral and spiritual prejudice as a result of losing the care of a husband or parents, with its estimation of mental suffering in dollars and cents, is foreign to German concepts of law. Anglo-American law is based upon a different theory in this respect." The study of these cases is, indeed, of more than usual interest to the student of comparative law, for it is not often that we find the concepts of different systems contending for recognition before a single tribunal.

Perhaps the translator has followed the German text rather too closely, and the English edition is not easy reading. But it is important that English-speaking scholars should be enabled to appreciate the German attitude towards the questions involved in these cases, and Dr. Kiesselbach's book, when studied together with the text of the decisions, forms a valuable contribution to the literature upon the practical application of the peace treaties. H. A. S.

LAW REFORM.[1]

THE review which Mr. Mullins has made of many problems of law reform deserves a special welcome in these pages since he has had opportunity to study foreign systems of law and legal administration by visiting courts of law abroad and meeting foreign lawyers. He claims that "there could be no better experience for an English lawyer" and contends that "few things would advance the cause of law reform in this country more than a widespread study of law and procedure in other countries." Without fully endorsing his observations, it may be said that the interest of his book is certainly increased, even for the layman, by his references to other systems of law.

The main thesis of this volume is that litigation should be encouraged by being made cheaper and more readily available. Whether the reader agrees depends upon his adoption of the point of view of the Lord Chief Justice or Mr. Mullins. The former has written that "the real triumph of courts of law is when the universal knowledge of their existence, and universal faith in their justice, reduce to a minimum the number of those who are willing so to behave as to expose themselves to their jurisdiction." Mr. Mullins strongly dissents from this observation and, carried to its logical conclusion, his argument would involve a community in which the affairs of everyday life would be regulated by litigation. To the ordinary man litigation is a state of war and one which he would avoid, not merely because of its cost or trouble but on principle. If he finds himself faced with the necessity to obtain a judicial decision, he may still, as Mr. Mullins points out, reduce the cost appreciably by the goodwill of the litigants and their lawyers. One of the great difficulties which lies outside his control is due to the introduction of unsatisfactory amendments into bills without any real opportunity for the draftsman to review the ill-considered activities of the legislators. The Income-tax Acts provide glaring examples. Why should some poor unfortunate taxpayer be made the target for litigation upon a point which affects hundreds of others besides himself? He can seek peace and ensue it with his neighbour over badly drafted agreements or clumsily worded correspondence or take the consequence, but against the State which thrives on litigation due to its own clumsiness and inability to pass intelligible legislation he has no redress.

Mr. Mullins comments upon the prolixity of legal text-books, and his own volume suffers somewhat in the same way. It would have gained in force by condensation. Considering the range of subjects covered, it is remarkable that there is no mention of Dr. Jenks's *Digest of English Civil Law*. That fact, which represents the attitude of the majority of English lawyers towards a book written on a symmetrical plan appreciated by foreign lawyers, is a complete answer to many of Mr. Mullins's contentions. Present financial conditions may stimulate support for some of his reforms, so that his book claims special attention at the present time, and they will reduce the amount of litigation, however many of his proposals are carried into effect.

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[1] *In Quest of Justice*, by Claud Mullins. (London: John Murray.) Pp. xvi + 448. Price 12*s*. net.

C. E. A. B.

THE MANCHURIAN QUESTION.[1]

THESE three volumes form three separate books. The first deals with Japan's special position in Manchuria, the second with the international legal status of the Kwantung leased territory, and the third with Japanese jurisdiction in the South Manchurian railway area. Each is introduced in a foreword by Professor W. W. Willoughby, who pays a high but not unmerited tribute to the author's knowledge and impartiality. Dr. Young has paid a number of visits to Manchuria, residing there for a considerable period. His material has been collected and sifted on the spot, being derived from " scores of Japanese and Chinese officials, administrators, technicians and scholars in Manchuria," including in particular the officials of the South Manchuria Railway Company. In his presentation he keeps strictly within the legal limitations that he has assigned to himself and abstains from passing judgment on the political and ethical issues which cross his path at every turn. Where there is so much that is both intrinsically interesting and peculiarly timely it is difficult to single out particular subjects ; but mention may be made of the very clear and well-documented account of the growth of Japanese power in Manchuria in the first volume, culminating in a most interesting chapter on the " Asia Monroe Doctrine," and of the account of the Chartered Company government of the South Manchuria Railway in Volume II. Reference must also be made to the appendix in Volume I, in which the author has given extracts, translated from the Japanese, of Viscount Ishii's memoirs, relating to the negotiation of the Ishii-Lansing Declaration in 1917 and its cancellation in 1923. These are extremely instructive for students of Japanese foreign policy.

A. Z.

PRIVATE INTERNATIONAL LAW.[2]

THIS book, which deals *inter alia* with status, succession, judgments and procedure, is the third and last volume of Professor Arminjon's great work on Private International Law, the preceding volumes having appeared in 1927 and 1930 respectively.[3] Some notion of the importance with which the subject is viewed on the Continent may be gained from the fact that the author has required in all some 1,250 pages to describe the principles that he supports. A standard work of this nature, which sets out current continental doctrine with that accuracy and acumen that have always distinguished the publications of Professor Arminjon, must make a strong appeal to English lawyers. Private international law in this country, in contrast with most of the other departments of law, is still in a state of infancy, and it is essentially a subject the development of which depends to an appreciable extent upon the opinions and rules adopted in other countries. The ideal that there should be world-wide uniformity in rules for the choice of law is no doubt unattainable in our time, especially as there seems no prospect of the rival principles of domicil and nationality, as the tests for governing questions of personal status, being reconciled; but nevertheless some progress towards a common system is possible if we are prepared to consider with intelligent sympathy the views held by foreign jurists. It is regrettable, therefore, that a modern foreign treatise has not been translated into English. Such a translation would not, having regard to the American market, be unprofitable, and it would enable those who are engaged in building up the English system to become more readily familiar with the trend of continental thought. Moreover, it would produce a more general realization of the fundamental differences that distinguish Anglo-Saxon and continental systems of Private International Law.

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[1] *Japan's Jurisdiction and International Legal Position in Manchuria*, by C. Walter Young, M.A., Ph.D. 3 volumes. (London: Humphrey Milford, 1931.) Pp. 412, 249, 332. Price 40s. net.

[2] *Précis de Droit international privé*, by P. Arminjon. Vol. iii. (Paris : Dalloz.) Pp. 538.

[3] See, for reviews of vols. i and ii, *Journal of Comparative Legislation*, Third Series, vol. ix, p. 279, and vol. xii, p. 133.

As illustrative of those differences we can take Professor Arminjon's treatment of divorce. The two questions that fall to be decided in this connexion are: first, When has a court jurisdiction to entertain a suit for divorce? and secondly, What system of law governs such a suit? The answers given by English law to these two questions are clear, concise and in our opinion logical. The courts of the country in which the parties have their common domicil are alone competent to entertain the suit: the system of law that exclusively governs all matters arising in the course of the suit is the *lex domicilii* of the parties, or, what is the same thing in this particular case, the *lex fori*. The nationality of the parties, the country in which they reside, the place where their marriage was solemnized or the matrimonial offences were committed—none of these has any bearing upon either question.

But when we turn to the French rules, as set out by our author, we find no such simplicity. The French courts would appear to possess jurisdiction, first, whenever a French person is one of the parties to the suit, and, secondly, when the parties reside in France without having a domicil elsewhere. Apart from these two cases jurisdiction depends upon the maxim *actor sequitur forum rei*, so that there is no objection to a suit for divorce being instituted in the country where the respondent is domiciled. We must not conclude that this maxim represents the English principle of jurisdiction. The result of the English rule, that the courts of the domicil have exclusive jurisdiction in the matter of divorce, is that a suit must necessarily be brought in the domicil of the respondent, since the petitioner and respondent, being husband and wife, must have a common domicil. But in many other countries it is possible for the spouses to have separate domicils, and it is when this occurs that the maxim operates to localize divorce jurisdiction in the respondent's domicil.

To take one instance only. It would seem, unless we have misunderstood the author, that the French wife of a domiciled Englishman is free to petition a court in France for a decree of divorce. But if this is so, what system of law must the court apply ? Suppose, for instance, that the matrimonial offence alleged by the wife is a sufficient ground for divorce in France but insufficient by English law. The author, disagreeing with earlier writers who had argued that French courts should invariably apply the personal law of the parties, unhesitatingly affirms that divorce should never be granted unless the ground upon which it is sought is sufficient both by the *lex fori* and by the law of nationality. This is satisfactory so far as it goes, but what is to happen if the parties have no common nationality does not appear. The freedom with which jurisdiction is assumed and the respect that is paid to the law of nationality seem, in fact, to raise so many difficulties in practice that, despite the attempts made at The Hague in 1902 to find a solution, we may feel thankful that English law has adopted the policy of referring suits for divorce to the jurisdiction and to the law of the common domicil of the parties. G. C. CHESHIRE.

TENDENCIES OF POST-WAR CONSTITUTIONAL LAW.[1]

THE author of this book, as editor of the collection of texts of the post-war Constitutions reviewed in a previous issue[2] and as Secretary-General of the *Institut International de Droit Public*, has had exceptional opportunities of studying the new Constitutions and of observing their practical application. The present work is a summary of a course of lectures delivered before the Faculty of Law of Paris.

On the whole the writer sees in these Constitutions the spread of democratic ideas. Democratic principles and rules of responsible government which in the States which observe them used to be unwritten have been reduced to writing and put into these new Constitutions. He finds everywhere evidences of what he styles *la rationalisation du pouvoir*. But he does not disguise the fact that there are at least three skeletons in the cupboard, for, in Russia, in Italy and in Poland, it cannot be said that democracy is triumphant. The book leaves Bolshevism, Fascism and dictatorial rule pretty much out of the discussion and confines itself to the new democracies.

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[1] *Les Nouvelles Tendances du Droit Constitutionnel*, by B. Mirkine-Guetzévitch. (Paris : Giard, 1931.) Pp. 218. Price 40 francs.

[2] See *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, p. 324.

The new Constitutions were framed after the war had shaken the foundations of Europe and they were inspired by the fear of arbitrary rule. For this reason they abound in checks on executive power. In some cases, according to Professor Mirkine-Guetzévitch, the constitution-makers have overreached themselves and have imposed so many checks as to render a firm government difficult if not impossible. We are quite prepared to take his word for this, but it would have been more interesting if he had given us concrete illustrations of this kind of failure. We imagine that no democratic government really works well unless two conditions are satisfied. There must be an adequate supply of competent and —what is even more important—of disinterested politicians, and there must be an electorate sufficiently alert and intelligent to form a fair judgment on what a government has done during its term of power. When these conditions are present the more power the executive has the better.

The author of this book does not think that much has been gained by new devices, such as the referendum. There is much in the book that will repay study.

F. P. W.

BELGIUM AND ITS LEGAL LIFE[1]

THIS is the first volume of a new series for which we prophesy much success. The editors need no introduction to this country. Professor Lévy-Ullmann is the author of one of the most remarkable books on the English law ever written by a foreigner, and the manifold activities of Professor Mirkine-Guetzévitch are well known and highly appreciated. The scheme of this series is excellent, and in this first volume it has been admirably carried out.

As the editors say, nothing is more important just now than that we should become internationally minded, and to arrive at this result we must learn something of each other's laws and customs.

They do not propose to give an abstract of the laws of each country, but rather a general description, a sort of map indicating its broad features. Each volume will be uniform and will have eight chapters dealing respectively with the constitution and political system, administration and finance, actions against the State, penal law, family law, property law and labour laws, commercial law, civil and commercial procedure and international affairs. Each chapter is to be written by a specialist belonging to the country concerned.

It is enough to glance over this volume to see that the editors have secured the services of eminent collaborators. And this volume, at any rate, is not only good, but, what is much rarer, it is readable. Belgium, as we all know, has a Constitution on the English model, and in no country, perhaps, have the liberties of the subject been more keenly or more successfully vindicated.

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[1] *La Vie juridique des Peuples—Belgique.* Sous la direction de H. Lévy-Ullmann et B. Mirkine-Guetzévitch. (Paris: Delagrave.) Pp. 448. Price 30 frs.

English readers will note with sympathy the statement that though the monarchy in Belgium is strictly constitutional, the personal influence of the King has nevertheless been very considerable and has been exercised with great prudence and discretion (p. 14).

As regards its civil law Belgium was given the Code Napoléon in 1803–4 when Belgium was part of French territory, and it has retained it ever since and made on the whole remarkably few changes, though there is no lack of laws on special subjects and particularly of labour legislation.

French law books have been diligently consulted and French cases regularly noted in Belgium for nearly a century and a half, and yet the Belgian law has developed on its own lines and has to a great extent resisted the moral pressure of French influence. French law in its modern developments has been made mainly by the professors whose views, sooner or later, have been adopted by the courts. Many of the innovations have been possible only by reading into the Code meanings of which its writers never dreamed. In some cases conclusions have been reached which are in flat contradiction with the text. *E.g.* when the codifiers laid down the rule that unlawful conditions in gifts and in testamentary provisions should be held *pro non scriptis* there is no reason to doubt that they meant what they said. They were quite aware that they were making a new rule as to gifts and affirming the old law, which was in fact the Roman law, as to wills.[1]

And yet, for eighty years or so, the French courts have been holding that when the condition appears to have been the *cause impulsive* of the gift or bequest the liberality falls to the ground instead of the person benefiting taking the benefit free of the condition. This may be a more excellent way, but it takes courage to maintain that it is a fair interpretation of the Code. Now, upon this, as upon many other points, the Belgian courts have been more conservative. Perhaps this is partly due to the influence of their famous commentator Laurent, who was a doughty champion of sticking to the text. To give two more illustrations, the French doctrine of *abus de droit* which now plays such a large part, and invades every branch of the civil law to such an extent that separate books are written about it, has made singularly little headway in Belgian law, and that law has firmly rejected the French system of *astreintes*, that is of judgments which order a defendant to pay so much a day till he complies with the judgment.

There is no chapter of this book which cannot be read with profit, but the outside observer will find a special interest in noting the sturdy independence with which the lawyers of a small country have stood out against the influence of their great neighbour.

F. P. W.

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[1] *C.C.* 900. See Larombière, Art. 1172, n. 13.

NATIONAL MINORITIES.[1]

This comprehensive volume opens with a brief discussion of the meaning of nationality and the relation between " state " and " nation." As the author rightly remarks : " From Finland to the Balkans we see nothing but multi-national states." He points out that the bankruptcy of the idea of the national state leaves the field clear for two apparently contradictory but in reality closely related conceptions, the multi-national state and the a-national state. Both are at one as to the need for drawing a frontier between the national and the civic ; but the a-national state, adapting the old liberal principle of the free church in the free state, disinterests itself as to what is happening on the other side of the state line, whilst the multi-national state feels that it has a duty to guide and, if necessary, to purify every important type of social manifestation.

The bulk of the book is then devoted to a careful and detailed study of the problem of national minorities in Europe. The subject is first treated theoretically, then historically, beginning with the Thirty Years War, then juridically. A survey is given of the legislation on the subject in various countries of Central and Eastern Europe. An attempt is then made on the basis of this material to give a systematic account of the established minority rights, special stress being laid on language rights. Then follows a section on the international provisions for the protection of minorities and the methods for their application. After this comes a section on the private international bodies concerned with the problem, particular emphasis being laid on the Minority Congresses organized annually since 1925 by Dr. Ammende, who was principally responsible for the very interesting legislation on the subject in Estonia. The last section offers some practical suggestions for the further development of the system of protection.

Within its limits the book is sound and scholarly. But the author's reading and thinking are confined to the European continent, excluding Great Britain and Russia. Wales, like French Canada, is a closed book to him. Only three works written in English are cited by him in a lengthy but predominantly German bibliography, and of these only one, a reference work, is by an Englishman. The resulting insufficiency is particularly marked in the theoretical section of the book.

A. Z.

LOANS ON GOODS IN COMMERCIAL LAW.[2]

In this little book, which is published under the auspices of the University of Barcelona, the author pleads for full consideration, in the expected new Commercial Code, of the law on warehouse receipts and warrants of all kinds which are used as documents of title to the deposited goods: the reason for his urgency being that the present code leaves these matters entirely unregulated. He compares the English law, and specially the law of Germany as practised in Hamburg, giving translations of the relevant commercial documents in the Appendix. Of general historical interest is his claim that deposit warehouses first made their appearance in Sicily during the Aragonese occupation, and his reference to the mutual relations of Nicolo da Cignano and Madona Iancoflore in the Decameron (1350), as amusingly narrated by Boccaccio, may, as he thinks, point to the first known mention of general warehouses. He mentions the new free zones in many ports, and among them those recently authorized which are to be at Barcelona and Cadiz.

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[1] *Das Recht der nationalen Minderheiten*, by Dr. jur. Georg H. J. Erler. (Münster, 1931.) Pp. 530.

[2] *Los Préstamos sobre Mercancías en las Leyes Mercantiles*, by Aurelio Joaniquet, Advocate of Barcelona. (Pub. Luis Planas, 1930.) Pp. 225.

Wyndham A. Bewes.

SURVEY OF ENGLISH LAW.[1]

The members of the Departments of Law and International Studies at the London School of Economics are performing a great service in bringing out this annual survey of what has happened in English law during the preceding year. Such a survey is extremely useful to members of the profession in England and will be a godsend to those numerous foreign students of our laws who have long suffered from the difficulty of keeping up with the various reports and journals, to say nothing of the statute-book.

The bibliographies annexed to each section are most valuable and there is an excellent index.

F. P. W.

GROTIUS SOCIETY.[2]

This volume contains as usual much good matter. Attention may be directed especially to the papers by Dr. F. de Király on "International Cartels," by Mr. F. Llewellyn Jones, M.P., on "The Nationality of Married Women," and by Mr. F. T. Grey on "The Relations of the Executive and the Judiciary." This volume contains an index to Vols. I—XV.

We have also to acknowledge:[3]

Property: A Study in Social Psychology. By Ernest Beaglehole. (London: George Allen & Unwin, Ltd.). Pp. 327. Price 10*s.* 6*d.*

American Family Laws. Vol. I. Introductory Survey and Marriage. By Chester G. Vernier. (London: Humphrey Milford, Oxford University Press.) Pp. xxi + 311. Price 27*s.* net.

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[1] *Annual Survey of English Law*, 1930. (London: London School of Economics, 1931.) Pp. xl + 328.

[2] *Transactions of the Grotius Society*, 1929, vol. xv. (London: Sweet & Maxwell.) Pp. xxiii + 171. Price to non-members 10*s.*

[3] Mention here does not preclude a later review.

Legal Duties and Other Essays in Jurisprudence. By Carleton Kemp Allen. (London: Humphrey Milford, Oxford University Press.) Pp. xvi + 318. Price 15*s.* net.

Colonial Admiralty Jurisdiction in the Seventeenth Century. By Helen J. Crump, M.A., Ph.D., Royal Empire Society Imperial Studies No. 5. (London: Longmans, Green & Co., Ltd.) Pp. x + 200. Price 9*s.* net.

Annual Digest of Public International Law Cases. Vol. II, Years 1927 and 1928. Ed. by A. D. McNair and H. Lauterpacht. (London: Longmans, Green & Co., Ltd.) Pp. li + 592. Price 42*s.* net.

Criminal Justice in England. By Pendleton Howard, LL.B., Ph.D. (London: Macmillan & Co., Ltd.) Pp. xv + 436. Price 15*s.* net.

Law of Torts. By Percy M. Winfield. Tagore Law Lecture. (London: Cambridge University Press.) Pp. xii + 254. Price 12*s.* 6*d.*

Manu and Jajnavalkya—Basic Hindu Law. By K. P. Jayaswal. Tagore Law Lecture. (Calcutta: Butterworth & Co. (India) Ltd.) Pp. xxiv + 331.

What Price Jury Trials? By Irvin Stalmaster. (Boston: The Stratford Co.) Pp. 143. Price $2.00.

Bentham's Theory of Legislation. Ed. by C. K. Ogden. (London: Kegan Paul, Trench, Trübner & Co., Ltd.) Pp. li + 555. Price 7*s.* 6*d.* net.

Taxation as it Affects the Doing of Business Abroad in Holland, Switzerland, Spain and Poland. Foreign Law Series No. 1 bis. (London: Sweet & Maxwell, Ltd.) Pp. 119. Price 5*s.* 6*d.* net.

Mining Laws of the British Empire and of Foreign Countries. Vol. X. New Zealand. (London: H.M. Stationery Office.) Pp. xvi + 503. Price £1 10*s.*

The International Conferences of American States, 1889–1928. Ed. by James Brown Scott. Carnegie Endowment for International Peace. (London: Humphrey Milford, Oxford University Press.) Pp. xliv + 551. Price 17*s.* 6*d.* net.

International Adjudications. Modern Series. Vol. III. *Pre-war Debts: Arbitration under Jay Treaty* (1794), *Article* 6. (London: Humphrey Milford, Oxford University Press.) Pp. xxviii + 564. Price 12*s.* 6*d.* net.

The British Year Book of International Law, 1931. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 271. Price 16*s.* net.

Soviet Administration of Criminal Law. By Judah Selitch, LL.M. (London: Humphrey Milford, Oxford University Press.) Pp. xix + 418. Price 28*s.* net.

Solon, or the Price of Justice. By C. P. Harvey. (London: Kegan Paul, Trench, Trübner & Co., Ltd.) Pp. 103. Price 2*s.* 6*d.* net.

Zivilgesetze der Gegenwart. Band England I. (Berlin: J. Bensheimer.) Pp. xiii + 711. Price RM. 56.

Die clausula rebus sic stantibus im Völkerrecht, insbesondere in ihrer Anwendung auf den Young-Plan. By Dr. Alexander Werth-Regendanz. (Göttingen: Vandenhoeck & Ruprecht, 1931.) Pp. 199. Price RM. 7.

Die internationale juristische Person. By Dr. Hans von der Lühe. (Göttingen: Vandenhoeck & Ruprecht, 1931.) Pp. 87. Price RM. 3.60.

Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht. By Dr. Max Rheinstein. (Berlin and Leipzig: Walter Gruyter & Co.) Pp. 256.

The following periodicals are also received; American Bar Association Journal; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bombay Law Journal; Bulletin de la Société italienne pour les Études de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Chinese Social and Political Science Review; L'Égypte Contemporaine; Gesetzgebung und Rechtspraxis des Auslandes; Gold Coast Review; Headway; Hindustan Review; Instituto Ibero-Americano de Derecho Comparado publications; International Labour Office Bulletin; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Rapports Judiciaires de Quebec; Revista de Ciencia Juridicas y Sociales; Revista de derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue Internationale de la Croix Rouge; Revue Internationale de l'Enfant; Social Sciences Quarterly; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences.

EVOLUTION OF PUBLIC LAW.[1]

[*Contributed by* THE RIGHT HON. SIR LESLIE SCOTT, K.C.]

Parliament.—In the perennial conflict between the governing and the governed, as to the power to command and the right to disobey, Parliament was the invention of the governed. That institution succeeded throughout the Western world in curtailing the powers of those who governed—or, as we should say in England, in cutting down the arbitrary Prerogative of the Crown. Complete sovereignty came to be vested in Parliament, whether the form of Government was constitutional monarchy or republic. The governed had won their freedom in theory by the introduction of responsible government. But in politics theory and practice are often far apart, and in the modern world Parliament has in practice gradually come to use its omnipotence in such a way as to regulate the life of the people to a much greater extent than any despotic sovereign ever attempted. The doctrine of " laisser faire laisser aller " is dead. The State, sarcastically described by Lassalle in the nineteenth century as a " nightwatchman " (*Nachtwaechter*) whose only function is to protect us against burglars, has become a vigilant nurse guiding the footsteps of the citizen from the cradle to the grave. The Government of my country recently asked Lord Macmillan—who is presiding over Section I of this Congress—to preside over a Committee on the Finance and Industry of Great Britain. Let me quote a passage from his report—a report full of interest :

> The most distinctive indication of the change of outlook of the government of this country in recent years has been its growing preoccupation, irrespective of party, with the management of the life of the people. A study of the Statute Book will show how profoundly the conception of the function of government has altered. Parliament finds itself increasingly engaged in legislation which has for its conscious aim the regulation of the day-to-day affairs of the community, and now intervenes in matters formerly thought to be entirely outside its scope. This new orientation has its dangers as well as its merits. Between liberty

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[1] Presidential Address to Section IV (Public and Penal Law), delivered August 2, 1932, at The Hague Congress on Comparative Law.

and government there is an age-long conflict. It is of vital importance that the new policy, while truly promoting liberty by securing better conditions of life for the people of this country, should not, in its zeal for interference, deprive them of their initiative and independence which are the nation's most valuable assets.[1]

I believe that all civilized countries have the same experience, and that the number of laws and regulations having the force of law has grown everywhere to an extent never known before or even anticipated. A German jurist a few years ago counted the number of Federal and State laws actually in force in the United States. There were roughly 5,500,000.[2] During the years from 1910 to 1929, which I spent in our Parliament, there took place an extraordinary widening of the field of legislative action. On the doorway of our House of Commons might well be written the maxim, *humani nihil a me alienum puto.*

Delegation of Functions to the Executive.—The desire of Parliament to embrace by legislation the whole of the life of the community has led to a peculiar result ; and when I use the word " Parliament " I mean that institution throughout the world, by whatever name it may be known. The first consequence was that it became impossible for Parliament itself to work out all the details of its numerous and important legislative enactments. To achieve its aim of extending its regulation over the life of the community it began to entrust legislative and even judicial functions to the Executive. That practice has grown in England so much of late years that leading jurists and statesmen have become concerned about it. The Lord Chief Justice of England, Lord Hewart, published in 1929 a book on the subject under the title of *The New Despotism.* In the same year, Lord Sankey, as Lord Chancellor, appointed a Committee on Legislative and Judicial Powers exercised by the Executive " to consider the powers exercised by or under the direction of (or by persons or bodies appointed specially by) Ministers of the Crown by way of (*a*) delegated legislation, and (*b*) judicial or quasi-judicial decision, and to report what safeguards are desirable or necessary to secure the constitutional principles of the sovereignty of Parliament and the supremacy of the Law."

That Committee—to the Chair of which I succeeded in May 1931—presented its report in March 1932.[3] I venture to think that its deliberations and recommendations will prove of interest to other nations besides my own—indeed to all students of public law.

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[1] Cmd. 3897 of 1931, pp. 4 and 5.

[2] Roth, *Der Trust* (1928), p. 200.

[3] Cmd. 4060 of 1932.

Separation of Powers.—The tendencies set in motion by the process of natural evolution in the functions of government have raised again—and with a very practical bearing on our lives—the great problem of separation of powers. Permit me to quote from the report on Ministers' Powers to which I have just referred :

> In the British Constitution there is no such thing as the absolute separation of legislative, executive, and judicial powers ; in practice it is inevitable that they should overlap. In such constitutions as those of France and the United States of America, attempts to keep them rigidly apart have been made, but have proved unsuccessful. The distinction is none the less real, and for our purposes important. One of the main problems of a modern democratic state is how to preserve the distinction, whilst avoiding too rigid an insistence on it, in the wide borderland where it is convenient to entrust minor legislative and judicial functions to executive authorities . . . (p. 4).
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> The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of legislation which modern public opinion requires.
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> In 1916 the American lawyer and statesman, Elihu Root, in his presidential address to the American Bar Association, after summarizing the agencies at work in the public life of the United States in the twentieth century, said :
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> " Before these agencies, the old doctrine prohibiting the delegation of legislative powers has virtually retired from the field and given up the fight. There will be no withdrawal from these experiments. We shall go on ; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to right, and obstacles to wrong doing, which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."
>
> In our opinion these words are as applicable to the United Kingdom to-day as they were to the United States in 1916 (pp. 23 and 24).

I observe that a great German authority, adopting the same view-point, states that the separation of powers in the modern State is carried out in principle only, but not strictly in every detail.[1] I need not remind you that in some of the modern States, for instance in the U.S.S.R., there is practically no separation of powers.[2]

State Action in the Development of Trade.—There are other agencies at work which are affecting profoundly the direction of growth both of constitutional law and of administrative practice in the modern State. One is the increasing realization that the State has an active part to play in the development of the nation's production and trade. Many factors have contributed to this change of opinion from the mid-nineteenth century view, that the function of the State was merely to keep the ring, whilst individualist enterprise fought out the battle of unfettered competition. The analysis of those factors is for the politician not the lawyer. We have only to note their tendencies and consequences sufficiently to appreciate the legal principles by which the new problems of law must be solved and the hand of the legislator guided. After the War the State itself in many countries embarked on industrial or commercial enterprise, and thereby raised in an acute form one of the legal problems assigned to our section of this Congress—the immunity of a sovereign State in municipal courts. In regard to shipping the *Comité Maritime International* negotiated a draft International Convention abolishing State immunity, and that Convention was conditionally agreed to several years ago, but, I regret, has not yet been finally adopted and given legislative effect. Economic experience of State trading since the War—at any rate outside the U.S.S.R.—seems likely to curtail the extent of commercial enterprise directly undertaken by the State. But the intensification of national feeling which has characterized the post-war period has had two reactions, which concern us. First, it has impelled States to aim at being self-sufficient—with little or no regard to the question whether national self-sufficiency is in each case economically remunerative or not, and has thus led to a network of legislative restrictions upon international commerce, from which we all know that we are suffering acutely. This protective nationalism exhibits in practice certain features which tend to remove it from the rule of law and from the guidance of the lawyer. Regarded internationally, the imposition by one country of a customs tariff appears to other countries as an act of executive policy by that country, and none the less so that it may be carried out internally by legislation. But this feature tends also to reproduce itself internally. The new tariff, being in fact the expression of the nation's executive policy, is in fact framed by its executive government : and just because it is the national policy, it tends to be treated as an executive matter. Hence the internal legislation tends to find expression in the legislative adoption of certain general principles, coupled with a delegation by Parliament to the Executive of wide discretionary powers in regard to the details of the plan. This method has been, for instance, that adopted by Great Britain in the fiscal measures passed by Parliament at the instance of the National Government.

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[1] Iellinek, *Verwaltungsrecht*, 1929, p. 13.

[2] Professor G. Gourvitch, *Principles of Soviet Constitution* (4th ed.), Moscow §§ 209 and 210.

For our present purposes it is the resultant tendency which is so significant. In proportion as more and more is left to executive discretion, so the legislative aspect tends to disappear, and with it the individual's right of recourse to the courts. The Rule of Law and the lawyer's opportunity to help the layman become alike circumscribed.

But there is a second reaction which is in Great Britain the more noticeable, that it has hitherto been less present there than in some European countries: and it may be that the second is potentially more capable of producing results directly beneficial to humanity than the first. The view is gaining ground that it is within the scope of the State's activities to help important industries of the country on the ground that under modern conditions they cannot normally prosper without such help. In England this new legislative policy, whilst endeavouring to give to an industry the help for which it asks, tends to impose a condition that the industry shall put its own domestic organization and equipment in order on sound business lines. Such measures necessarily indicate great changes of constitutional outlook, although at present it is difficult to do more than discern the tendencies to change.

Another type of agency making for change in our public and penal law is the practical necessity for the international regulation of various human activities which are international in nature, such as shipping, aviation, and transport generally, telegraphs and wireless, and emigration; of industrial property such as patents, trademarks and copyright, and even of certain sources of economic inequality such as the hours and conditions of labour. Here the law which results is in the main, and except on the penal side, private and not public. But in so far as obligations of public law necessarily result from international regulation, the topic properly comes within the domain of public and penal law.

Regulation of Proceedings against the Crown.—In truth the work of our section is of the very greatest importance in its practical bearing upon the life of nations. We must try to tell each other how the public and penal law is developing in our respective countries; what are the discernible tendencies; what are their causes; in what directions legislative intervention is taking place; and what forms it is taking. We want to learn from each other how best to secure the social and economic aims of Parliament without interfering unduly with individual liberty—with what we in England call "the ancient rights of Britons" and our French friends in more abstract language have called "*les droits de l'homme.*" For individual liberty may be unduly curtailed in two ways. Our lives may be over-regulated by harassing and excessive legislative control—we may have too much law, in the sense of legislation. But we may also lose our liberty by having too little law, in the sense of justice. As a nation we Englishmen believe that the Rule of Law is the condition of liberty; and that, as a fundamental principle of policy, it should always be open to every citizen to vindicate his rights in the courts of justice. In that connexion the regulation of proceedings against the Crown and its officials by citizens aggrieved by unlawful acts of the Executive must occupy our attention to-day more than ever. In my country, as you know, there are no administrative courts in the French sense. The ordinary law courts can in theory deal—as pointed out by Professor Dicey—with any actual and provable breach of the law committed by any servant of the Crown.[1]

Professor Berthélemy of Paris tells us about a conversation he had with Professor Dicey:

"Professor Dicey, to whom I offered, about thirty years ago, the first edition of my *Traité de droit administratif*, said to me:

"'In England, there is no *droit administratif*; we do not know what it can be'; and smilingly he added, 'We prefer not to know, fearing regulations which appear less as guarantees for citizens than privileges for officials.'"[2]

Those words of Dicey's admirably sum up what we feel in England about *droit administratif.*

On the other hand our procedure against the Crown is very cumbersome and antiquated and its reform is urgently needed in order to remove various archaic privileges of the Crown as litigant, which put the subject at a disadvantage. Certain safeguards must remain to protect the public interest, but they are too technical for this address. Those students who desire further information on the present position of that subject in England will find it in the report of the Crown Proceedings Committee,[3] or rather in the draft Bill attached thereto.

[1] See p. 111 of the *Report on Ministers' Powers* (Cmd. 4060 of 1932).

[2] See the *Journal of Comparative Legislation and International Law*, Third Series, vol. xii, pt. i, p. 28.

[3] Cmd. 2842 of 1927.

Emergency Powers.—I want to mention another problem in the realm of public law. The unprecedented economic and political conditions of our days have frequently in various countries given rise to a state of emergency. When that happens we see all or some of the sovereign powers of the State, executive, legislative, or even judicial, taken from the organs to which they are normally entrusted, and handed over to a small body of men or even one man. Sometimes there is a provision in the country's Constitution which allows this to be done on the happening of an " emergency." Sometimes there is not. From the authority so appointed there flows a stream of Emergency Decrees, under a variety of names, which may and often do profoundly alter temporarily or permanently the economic, social and legal structure of their country. The place of such decrees in the constitutional system of the country concerned is a difficult problem for the modern student of public law. That emergency powers are essential none will dispute. That the Constitution of a country should contain express provisions for their exercise few will dispute. It is obvious that the assumption of emergency powers when it is necessary should involve the least possible dislocation of the machinery of government. That their assumption should not be made too easy is equally plain. The truth is that the difficulty lies less in stating the principles, than in defining the standard by which the question of emergency or no emergency may be ascertained. That it must be left primarily to the Executive Government there can be little doubt. But we lawyers may well consider these matters in order to see how we can help in a wise ordering of them, so as to preserve the Rule of Law so far as possible.

Crisis of Parliamentary Government.—It is largely in connexion with this political phenomenon in the greater as well as the smaller countries of the world that you so often hear men speak of the so-called " crisis of parliamentary government." " Have not Parliaments," say the critics of Parliamentary government, " outlived their utility ? Should not some different kind of body, elected popularly or appointed by the executive, be substituted for, or at least be introduced so as to work alongside of, parliaments ? " The whole framework of modern constitutional law is undergoing survey, with a view to reform and adaptation of it to the needs of the day.

The language of many almost tempts one to think that they have in mind an attempt to " rationalize " constitutional law—if I may use an expression without which a few years ago no one could discuss any industrial problem. How far that kind of " rationalization " has in truth been applied to industry it is not easy to say. Anyhow it has not prevented the present *débâcle* of the world's trade. I for one view with suspicion the abstract logic of extreme systematization ; the factors of human progress are too complex.

For these reasons lawyers are likely to think twice before they approach the equally intricate problems of constitutional law in any similar spirit. To us Englishmen the rationalistic attitude of mind is alien in life as well as in law. " England," said Lord Beaconsfield, " is not governed by logic ; she is governed by Parliament." [1] That is why our jurists give much less time to the study of theories of public law than their colleagues abroad. But that study, the calm, scientific analysis of all the schemes of government invented by the fertile brains of those engaged in political battles, is of the greatest value. In long travail mankind has evolved systems of government—as imperfect as all work of man, and still as impressive and useful as his other great creations—religion, language and art. I feel that students of the history of public law will rather pronounce for the evolution of our systems than for their revolutionary replacement by the *a priori* schemes of the most logical politicians.

Constitutional problems of difficulty and importance have to be faced now in the British Empire. The development of its component units is in the direction of greater autonomy and self-government. You are all familiar with that tendency. You have, for instance, been watching the movements of opinion in India. In 1928 I went there to advise the Ruling Princes—whose States cover more than a third of the Indian peninsula—on questions of constitutional law ; and since then I have been privileged to have an inside view of those problems of constitution building from the angle of the Indian States. In the British Empire the process of constitutional change is less painful than it would have been in most other States because our Constitution is not written. Our constitutional usage is, as it were, a living organism, and our rules are flexible, not rigid as are the paragraphs of enactments. The study of the public law of other nations is no doubt a very good tonic for our somewhat relaxed constitution if you will forgive the *jeu de mots*. Each nation should contribute to the common stock of progress what is natural to its genius. For that reason we English believe that the study of our evolution will be profitable for other nations now moving away from the letter of their Constitutions in the direction of a more modern and less rigid organization of the State. The Constitution of the British Commonwealth of Nations under the Statute of Westminster, 1931, appears to most jurists a truly nebulous form of Constitution. But even a nebula gives some light, though faint; and the astronomers tell us that by a process of evolution the nebula grows in time into a shining sun.

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[1] *Report of Committee on Ministers' Powers*, p. 23.

Penal Law.—The questions of penal law, which are to be discussed by our section, are practical questions. To its theory I am bound to confess that few English jurists have devoted much time. We have no general criminal code, but our criminal law has been to a great extent codified by Statutes dealing with various particular subjects; and as a result a person charged with an offence can read in the relevant section of the Statute exactly what the offence is with which he is charged. In the case of criminal procedure again we have no code, and nothing even approaching a code. Historically both the substantive law and the procedure are to a large extent the outcome of trial by jury. The criminality of an act really open to doubt or dispute is, in our unwritten Constitution, left to the appreciation of the jury, subject only to the legal guidance of the judge. The nation, in short, entrusts to the jury the expression of national policy in criminal matters. The very form according to which the jury is sworn in a trial for misdemeanour shows how the accused is regarded just as a party to an issue for trial; and it is the King and not any personification of the State who is the other party: "You shall well and truly try the issue joined between our Sovereign Lord the King and the Defendant"; and the presumption of innocence on that issue merely follows (in a stronger form) the rule of every civil action that the plaintiff must prove his case.

It is important to note that we in England have not followed the principle pervading some systems of criminal law that the protection of the State must be paramount, and the punishment of a crime controlled by the interest of the State, whilst the fate of the perpetrator of the crime is regarded as only a secondary consideration.

Professor Gerland, in discussing the German draft penal code and its place in the history of penal law, sums up that principle as follows:

> The draft regards the relation between the individual and the State as consisting primarily in duties which the citizen owes to the State and in his solidarity with the community. The freedom of the individual is not the first thing to be considered.[1]

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[1] The *Journal of Comparative Legislation and International Law*, Third Series vol. xi, pt. i, p. 32.

In a recent study by Dr. Stallybrass comparing the general principles of the law of England with the draft of a new criminal code for Italy we find the following statement :

> Italy has been called the *patria del diritto penale*, and with justice. Nor has she been forgetful of her heritage. The names of Beccaria, Carrara, Lombroso and Ferri have won the homage not only of Italy, but of the world. England, too, has played her part in the progress of the world towards a rational system of criminal law. But her contribution has been different in kind. She cannot boast of any names recognized beyond the confines of her own land, except those of Howard and Bentham, as having helped to the advancement of penal theory. Her glory is that, thanks to the integrity and ability of her judges, the high standard of honour and public spirit of her Bar, the practical common sense of her citizens who serve upon her juries and the efficiency of her police, there is no country in the world where an innocent man is less likely to be convicted or a guilty man is less likely to escape punishment for his crime. The genius of the Italian is for theory ; the genius of the Englishman is for practical administration. Each in his own way has contributed much to the improvement of criminal law. Each still has much to learn from the other.[1]

But human nature is the same everywhere, and we all must be ready to exchange our knowledge and compare our opinions as to both the results and the procedure of criminal justice in our several countries. The more different our traditions and our instinctive point of view, the more need is there for, and the more mutual help there is to be obtained by, such interchange.

There is one topic of the highest practical importance at the present day because of its far-reaching effects for good or bad upon the life of the community and perhaps even upon the character of the nation. We have been spectators of, and perhaps actors in, an almost continuous output of legislation, imposing on the citizen new duties, or making unlawful conduct hitherto lawful. The result is new categories of crimes. Every day a new law dealing with motor-cars and traffic, or currency, or wireless, or alcoholic drink, or cinemas, introduces a new addition to the list of offences punishable by law. How should these offences be dealt with ? What is their place in the system of criminal law ? What courts should try those offences ? Above all, what is their effect upon the Rule of Law ?

Let me quote a passage from *The Common Law of England*,[2] by Mr. W. Blake Odgers, which gives a dispassionate description of the conditions in England. It is as follows :

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[1] *The Journal of Comparative Legislation and International Law*, Third Series, vol. xiii, pt. iv, p. 203.

[2] Second Edition, p. 131.

The number of crimes known to our law has increased enormously during the last hundred years. These additions have been made from time to time as occasion required, and very little of the former law has been repealed. Our criminal law, too, deals with a great variety of different subjects. No department of public or private life is beyond its ken. Recourse is had to legislation whenever the exigencies of the moment, and the varying interests of the community demand the creation of a new offence. What is now a crime may formerly have been a mere tort, and possibly ere long may be a tort again. " It is a good rule in criminal jurisprudence not to multiply crimes, to make as few matters as possible the subject of the criminal law for the prevention and remedy of wrongs."[1] But this is not the policy at present pursued by the State.

But I repeat my question : " What effect has such legislation on the Rule of Law ? " No doubt the legislator must be primarily responsible to the nation for framing his legislation. But I hold that wherever policy is likely to put in jeopardy the Rule of Law, the lawyer is entitled to make his voice heard, and indeed is under a public duty to do so. In our modern civilization it is a canon of cardinal importance that nothing should be done by the legislator which tends to weaken the instinctive respect of the people for the law of the land, or its trust in it. That respect is the foundation of our liberty. To weaken it in one regard is to weaken it in all. To allow one branch of the penal law to fall into disrepute is to bring disrepute upon all law.

It is for this reason that it is so important that the politician in his zeal to reform some particular evil of the body politic should not pass legislation which makes a crime of that which the moral sense of the community at large does not regard as wrong. The reaction is inevitable. Public opinion is stronger than the inhibitions of the Statute book ; and the tendency to resist, to disregard, and to evade the particular law may easily pass into general disrespect for all law. Once the Rule of Law is weakened, liberty is impaired, and security is put in jeopardy.

Extradition.—I should like to add a few words about extradition. Professor Saldaña, in his lecture on "*La Justice Pénale Internationale*," delivered at the *Académie de Droit International* in this City in 1925, deals fully with the general evolution of the notion of extradition. He very rightly points out that the civilized community to-day, though using the weapon of extradition, is as yet unable to fight the international criminal. " *Au bloc puissant de la*

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[1] Per Bramwell, B., in *R.* v. *Middleton* (1873), L.R. 3 C.C.R., at p. 54.

criminalité internationale elle n'oppose qu'une répression nationale inutile, bien qu'elle soit munie d'un instrument juridique : l'extradition."[1] He pleads for the organization of international penal justice and has drafted a code with the following object :

> *Le code pénal international est au service de la Société internationale* (*aujourd'hui* " *Société des Nations* "), *dans sa lutte contre la criminalité internationale.*[2]

We must all, I fear, recognize that the day when the ideal solution of Professor Saldaña can be given practical effect is still far off. In the meantime it is desirable to lay down a policy for extradition legislation to which all nations can subscribe, in which a reasonable compromise can be achieved between the urgent need for suppressing crime and the not less urgent need of protecting individual liberty.

Conclusion.—Let me end my sketch of some of the problems of public and penal law by expressing the hope, nay, the firm conviction, that the evolution of these two branches of law, in harmony with the deeper needs of society, will not be interrupted by any sudden substitution of arbitrary power for the Rule of Law. In the darkness of the Middle Ages English jurists warned the Kings not to abuse their power, not to attempt to be above the law. In one of our early Law Reports (*Year Book*, 19 Henry VI) we find the following statements in the old Norman-French jargon then used in our courts :

> *La ley est la plus haute inheritance, que le roy ad ; car par la ley il même et toutes ces sujets sont rulés, et si la ley ne fuit, nul roy, et nul inheritance sera.*[3]

The complexity of modern life has made necessary serious restrictions in every sphere of activity of the individual citizen. If those restrictions are consonant with the broad outlines of the community's moral sense, are imposed by the ordinary methods of legislation, are applied by the Executive equally and without unfair discrimination, and finally are left for enforcement to the jurisdiction of the ordinary courts, the citizens will loyally submit to them. But if far-reaching restrictions are imposed arbitrarily or unequally, or beyond the necessities of a real state of emergency, the ordinary law-abiding citizen will inevitably resent such treatment as an abuse of the name of law, and in the end will revolt in order to safeguard his liberty.

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[1] *Recueil des Cours*, vol. x, at p. 353.

[2] *Op. cit.*, p. 389.

[3] See Translation in the *Report of Committee on Ministers' Powers*, p. 71.

I do not attempt to sum up my address, but may I state my impression of the evolution, which is in progress? A great English thinker—Herbert Spencer—has described the progress of the nineteenth century as being like a great law-suit between the individual and the State (Man versus the State). It seems to me that, inaccurate as this description is, it affords an excellent illustration. Imagine the law-suit. Some of us are pleading for the State, others for the individual. What law is to be applied? It must be the general principles of eternal justice as formulated after a comparative analysis of the different systems of law. The court is Public Opinion, and it is Humanity which pronounces the judgment.

It is for the advocates to formulate the principles on which the court can base its decision. Hence the great responsibility which rests on us who are now studying, applying and formulating the principles of public and penal law. In the course of the ages lawyers change but their work remains always the same. Our aim—if I may be allowed to borrow a phrase from Buffon in his "*Manières d'étudier l'histoire naturelle*"— is "*généraliser les faits—saisir les rapports éloignés, et en former un corps d'idées générales.*"

GERMAN LAW AND NEW PROBLEMS OF LEGISLATION IN GERMANY.[1]

[*Contributed by* DR. E. HASKIN, *Berlin*.]

IN the course of last year there have been two large conferences of German lawyers—namely, the meeting in Essen of the German group of the International Association of Criminal Lawyers (*Internationale Kriminalistische Vereinigung*), and the German *Juristentag* in Lübeck.

On both occasions the representatives of German legal science, including both teachers and practitioners, have defined their attitude as regards actual problems confronting the German legislature, and their weighty opinions, formulated in specific resolutions, are bound to have great influence with the legislative bodies.

I. The Meeting of Criminal Lawyers.—Habitual Criminals.—The main topic of discussion by the criminal lawyers was that of the so-called "professional criminal," and in what manner the fight against him was to be waged. The long-continued and successful labours of German criminal lawyers, directed towards a reform in the treatment of criminals by instituting a scheme of education for such of them as were capable of improvement had already borne fruit in the Decree of the Prussian Minister of Justice of June 7, 1929. The German group now turned its attention towards the methods of treating and of repressing the unimprovable habitual criminal. It was necessary to investigate this special criminal type and to propose measures for dealing successfully with him. An attempt was made to bring him under the denomination of "professional criminal." If popular language is to be trusted, there is a type of criminal consisting of those who take up and practise crime as an occupation just as a man becomes a trader or an artisan. But it is very doubtful if it is possible in a scientific way to isolate this type of criminal and to apply special treatment to him. The General Report of Dr. Hagemann (*Oberverwaltungsgerichtsrat*) was devoted to a comprehensive description of the " professional criminal," but what it in fact described was the habitual criminal of the large cities, that is to say a wider class than the so-called professional criminals.

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[1] Translated by the Editor.

In the course of the meeting it became clear that nothing was to be gained by adopting this new conception—a conception which remained vague and merely a word with no satisfactory meaning—and that it was best to adhere to the plan of the Draft Penal Code which deals specially with habitual criminals who are a danger to society.[1] Accordingly a resolution was adopted against the acceptance in the Penal Code of this conception of " professional criminal."

The report of Professor Extner was devoted to the reforms of Penal Law, Penal Procedure and Prison Discipline which were necessary for dealing with habitual criminals. In the course of the discussion it became clear that there was no support on any side for the so-called " preventive custody " (*Sicherungsverwahrung*). And a proposal was rejected in favour of allowing a sentence of punishment for a fixed time to be followed by a period of preventive detention. On the other hand the meeting approved unanimously of sentences of imprisonment for an indeterminate time, a method which the Association had long advocated.

The position having now been established that the object to be aimed at in the treatment of prisoners capable of improvement was to provide a training for them, and measures to that end having been adopted, the problem which next presented itself was to find ways and means of protecting society from criminals incapable of reform and being a public danger. Two methods suggested themselves: preventive custody and the indeterminate sentence. By the former term is meant that the dangerous criminal after he has served his term of punishment shall be handed over to the administrative authorities who shall have the right to detain him further in special institutions, that is, to keep him in confinement. This is the method adopted by some systems of law, and among others by the Belgian " Law for the Protection of Society " of January 1, 1931. German penal law knows at present nothing of measures of this kind, though the necessity of some such means of protecting society is widely admitted. Proposals of this character were made in connexion with the revision of the Penal Code and a scheme was drafted for the organization of special institutions for detention of this kind. The latter method of dealing with the habitual criminal, namely, the indeterminate sentence, is adopted in the Draft Penal Code of 1927. This form of sentence presupposes a power in the court under certain conditions to order the confinement of the prisoner without fixing a definite period at which it is to terminate. The prisoner remains in custody so long as the prison authorities consider this to be necessary in view of the danger to society. Educational means for the improvement of the prisoner are prescribed. The German group of the I.K.V. pronounced in favour of this method and thereby associated itself with the authors of the Draft Penal Code of 1927. The following resolution was adopted :

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[1] See as to the Draft Penal Code the article by Professor H. B. Gerland in *Journal of Comparative Legislation*, Third Series, vol. xi, p. 19.

> When any person who has already been twice sentenced to death, penal servitude, or to imprisonment for six months or more, and has previously served a sentence of at least one year, is sentenced for the third time to any such punishment it is for the court to examine whether a sentence for a determinate period is sufficient for the protection of society. An indeterminate sentence is to be pronounced when it appears from the new offence, taken in connexion with the previous offences, that the offender is an habitual criminal and dangerous to the public safety.

In accordance with their general view as to the education of prisoners the I.K.V. claimed that provision should be made for the education of those prisoners under indeterminate sentence. They thus indicated their approval of the regulations in the Prussian Decree which divide punishments into different stages, and direct that the prison authorities in the special institutions for prisoners difficult to reform shall encourage such of them as show any signs of amendment, and shall protect them from the impression that they are being abandoned as hopeless.

" Necessity Overriding Law."—The second subject discussed at the meeting was the much-debated judgment of the *Reichsgericht* concerning justification by the plea of " necessity overriding law " (*übergesetzlicher Notstand*) in a case of procuring abortion. The extreme difficulty of the " necessity " problem was clearly manifested in the very complicated reports of Reichsgerichtsrat Waschinger and Professor Eberhard Schmidt. The questions raised in them were not cleared up in any definite manner and were postponed for later discussion. The meaning and extent of this so-called " necessity overriding law " are so interesting that we may be permitted to examine the question rather more narrowly. One result of the slow rate of progress in the reform of the Penal Law has been that the *Reichsgericht* has, on several occasions, interpreted the law in a sense corresponding rather to the Draft Penal Code than to the Code actually in force. In so doing the *Reichsgericht* has followed the common practice of jurists in building up a general theory out of isolated cases. This is what has happened with the theory of "necessity." By "necessity" the existing German law means a state of danger for legally protected interests from which the person subject to the danger can escape only by doing injury to the legally protected interests of another. "Necessity"—*Notstand*—is distinguished from "self-defence"—*Notwehr*—in this respect that in a case of "self-defence" the person defends his right against wrongful aggression, whereas in the case of "necessity" he seeks to protect his right at the expense of the right of another.

According to the law as it stands, a man does not act unlawfully and therefore is not liable to punishment when he injures or destroys the property of another in order to avoid a danger provided that there is no other means of avoiding it, and provided also that the damage caused is not out of proportion to the danger.[1] And further the Penal Code enacts that an act is not punishable if it is committed in a case of "necessity" in order to save the life or bodily safety of the doer or one of his relatives, always provided that no other means of escape are available.[2]

From these two enactments taken together it follows that an injury done to the property of others is protected if it was done in a case of "necessity" and so likewise is an invasion of other legal rights belonging to another when there was danger to life or limb. But when the person causing the damage has invaded the right of another which is not a right over a corporeal thing, the law gives him no protection unless he acted to protect his own bodily safety or that of a relative. The draft of the new Penal Code makes a supplementary provision in order to fill up the lacuna.

The facts of the case in which the *Reichsgericht* gave its famous decision of March 11, 1927, were as follows:

An unmarried woman who was under an accusation of a criminal offence became pregnant. She was at the time under the care of a nerve specialist. This doctor, according to his evidence, satisfied himself that owing to the nervous depression from which the accused was suffering there was a serious danger of her committing suicide. In order to prevent this he induced a woman doctor to perform an operation to procure abortion. The question for the court was whether the doctor in attempting to avoid the danger to the life of his patient, *i.e.* the danger of suicide, had unlawfully invaded the

[1] B.G.B. 228, 904.

[2] Straf G.B. 54.

right of the unborn child, or whether in the circumstances there was no unlawful act, and therefore no punishable offence. In other words, was this a case of " necessity " ?

As already stated, the law as it stands expressly allows this justification only when there is danger to the life or limb of a relative (*Angehörige*).[1] It is clear that there is here a lacuna which is filled up in the new draft according to which the justification is not confined to cases when the person endangered is a relative. The judgment of the *Reichsgericht* in the case referred to interprets the existing law as affording protection to the doctor in the circumstances stated. The process of reasoning was as follows :

Art. 54 provides a justification for certain acts. But the express provisions of the Code do not exclude the possibility that there may be other circumstances in which an act done in consequence of " necessity " may be excusable. In considering whether an act may be regarded as justifiable we are entitled to have regard to the unwritten as well as to the written law. The expression itself, " necessity overriding law," implies this. The written law does not meet all the cases, for it deals only with injury to *things*.

The view of the *Reichsgericht* is that in such a question of life and death we must follow the principles laid down in the law as to the comparative value of the rights and duties which may conflict. When we are dealing with things capable of being valued in money, the rule is that it is not unlawful to sacrifice a thing which is of small value in order to save a thing of great value. The question here is which right is to be considered of the higher value looking to the general principles of law. Was the life of the mother more valuable than that of the unborn child ? The *Reichsgericht*, following the view of most jurists and medical men, considered that the mother's life was to be regarded as the more valuable, and it came accordingly to the conclusion that the act of the doctor done for the purpose of saving the life of the mother was not unlawful and therefore not an offence. The court took it as proved that the only way of saving the life of the mother was by procuring the abortion.

The Draft Penal Code affords a solution which is in accordance with the trend of legal opinion.

By Art. 25 of the Draft Penal Code of 1927, " an act otherwise punishable may be justified as done of ' necessity ' when it is done to avert from oneself or from another an imminent danger provided that there is no other way of escape, and provided also that it is not reasonable to expect in the circumstances that the doer of the act or the person in danger after due consideration of the conflicting interests should have decided to suffer the threatened injury."

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[1] B.G.B., Art. 54.

The meeting closed with the election of a new Committee and at the same time Professor Delaquis of Hamburg, one of the persons newly elected, was charged with the task of bringing about combined action on the part of the I.K.V. and of the *Association Internationale du Droit Pénal.* This admirable resolution had its origin in the joint labours of the representatives of both these Associations at the Tenth International Congress of Penal Law and Prison Administration, held in Prague. The resolution adopted at that Congress as to the necessity of comparing the fundamental principles of penal legislation was calculated to lead to closer intercourse between the criminal lawyers in different countries. The course of events has justified this expectation, and the resolution referred to of the I.K.B. affords good hope of fruitful co-operation.

II. The Juristentag.—The German *Juristentag* which brings together not only academic lawyers but also practitioners, judges and public prosecutors, does not confine itself to theoretical discussion of the questions presented, but seeks to exercise a direct influence over legislation. The programme of 1931—there was no meeting in 1930—contains many subjects in which not only the lawyers, but also important sections of the German public are keenly interested.

Family Law.—As such must be regarded the following question which came within the province of the Civil Law Section :

To what extent do the provisions of the German Code as to family law require modification in the light of the declaration in the German Constitution as to the equality of the sexes ? [1]

This question is sharply raised by the violent contradiction between the principle of equality proclaimed in the Constitution and the principle of the predominant position of the husband as laid down in this Civil Code. The principle of equality is in accordance with the decisive changes which have in fact taken place in the last generation in the social and economic position of the wife. The problem was how to harmonize the existing law with these changes, and to draft articles as to marriage which should express the equal rights of the spouses. With this object a careful examination was made of the personal and patrimonial rights of the spouses, and of the law of parent and child and various proposals for amendment were discussed.

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[1] Art. 119, Abs. 1, Satz. 2.

As regards the personal rights the chief stumbling-stone was the provision of Art. 1354 of the B.G.B., which gives the husband the right to decide all matters concerning the conjugal life. It was felt in particular that the law allowing the husband to fix the domicile ought to be amended, and that this matter should be left to be determined by the free agreement of the consorts. Further the wife's right to retain her married name after divorce ought to be admitted. The law as to patrimonial rights required amendment, especially as regards the community of goods and the separation of this community, and as regards the right of both spouses to share in property acquired during the marriage.

As to the law of parent and child the existing law which gives to the father the sole right to decide questions as to the management of the person and property of the children must be revised in the light of the changed situation in the position of a wife. All these points, which can here merely be alluded to, were dealt with in excellent reports, among which may be mentioned particularly that of Dr. Marianne Weber, and were fully discussed. The resolution finally arrived at was to the following effect : The portions of the B.G.B. dealing with family law should be amended. This amendment is called for not only by the declaration in the Constitution of the equality of the sexes, but also by the alteration in the social and cultural position of the wife. In order to adapt the law to the changed situation there must be amendments as to (1) the personal rights of the spouses, (2) as to their patrimonial rights whether under the common law or by marriage-contract, (3) as to the authority of the parents during and after the marriage, and (4) as to guardianship.

Law of Trusts.—The second topic dealt with by this section was the question whether legislation was called for as to the law of trusts, and this question was answered in the affirmative.

Despite the truly American *tempo* with which the trust has developed itself in Germany in recent years, and despite the important place which it occupies now in the legal life of Germany, trusts as such have received so far no legislative recognition in that country. The word " trust " is not so much as mentioned in the B.G.B.

The main principles of this institution have been gradually worked out by the practice of lawyers and by judicial decisions, and they are now firmly settled, but there is still much dispute as to many details. The extent to which trusts have been made use of in business, and the large number of decisions on the subject make it necessary to have this institution dealt with by legislative enactments. In putting the subject on its programme the *Juristentag* indicated its opinion in this sense. Weighty proposals and draft laws were brought forward in various reports and in opinions of experts. The *Juristentag* recognized to the full the necessity for legislative regulation of the law of trusts, but declined to commit itself as to the precise form which such legislation should take.

Criminal Trials.—The Section of Penal Law considered the question how far the *Reichsgericht* after the new Penal Code had come into force would be bound by its decisions on the interpretation of the old Code. As to this there was so much difference of opinion that no resolution was arrived at. The Section next considered proposed amendments of the law as to procedure for the revision of criminal trials and as to compensation to innocent persons who had been convicted. The Section decided against allowing revision at the instance of the prosecutor, and associated itself upon this point with the view adopted in the draft of the Introduction to the new Penal Code. By revision of a criminal trial is here meant the opening up of a criminal trial which has been concluded by a legal judgment. As the law stands, this is admissible only in a few cases and under strict conditions of which the most important is that there must be a new "fact," of which neither the accused nor the court was aware at the first trial, and calculated to lead to the acquittal of the accused or to a milder sentence. In recent times it has frequently been suggested in Germany that this law should be reformed. Impetus has been given to the movement for reform by the reduction which has come about in recent years of the lay element in criminal trials and by certain judicial errors which have excited much public attention.

The draft of an introductory law to appear with the new Penal Code provides for the revision of criminal trials. The main points in it are as follows:

The rule that the "fact" brought forward as a ground for the revision of the trial must be "new" is to some extent altered. Any important fact is to be sufficient if it was not considered at the previous trial because it was unknown to the court. It is immaterial whether the prisoner knew of it or not. The Draft expresses this in the negative form: "Facts which were not known to the court which tried the case."

The Draft makes another important change in regard to the court which is to deal with the petition. As the law now stands, this is the same court as that which pronounced the original judgment. According to the Draft the court is to be the same, but no judge who was a party to the first judgment is entitled to sit at the hearing of the petition.

The amendment no doubt had its origin in the misgivings which have sometimes been expressed as to the working of the old law. The existing law admits a petition for revision, not only by the prisoner, but in certain cases by the prosecution, as *e.g.* when it is alleged that a judge has acted improperly, or that a witness for the defence has committed perjury. The Draft does not allow a petition for revision at the instance of the prosecution, and the *Juristentag* approves of this in spite of some attempts which had been made to re-introduce it into the Draft.

The *Juristentag* also expressed its approval of a series of amendments in the procedure for revision, which are laid down in the Draft.

Citizenship.—The Section on Public Law considered a question which excites great interest and has a political as well as a legal side. Is it expedient to make a fundamental change in the law as to citizenship in the *Reich*, and of the component States? The German law of 1913 is based upon the so-called *jus sanguinis*, that is, on the basis of parentage, and this still holds good in spite of the numerous changes caused by the War. It does not seem likely that in this respect any important change will be made in the near future, and the legal opinion on the subject which was presented to the *Juristentag* recommended the maintenance of the *status quo*.

Great interest was aroused by another question concerning suggested constitutional reforms with a view of putting an end to what is known as *Vielstaaterei*, *i.e.* citizenship of several States. The question of citizenship of the *Reich* and of the several States is acute, and has been much debated. The distinguishing mark of the present system is that there are no Germans, that is, Germans of the *Reich*, but only citizens of Prussia, Bavaria, Baden and so forth. This is in violent conflict with the tendency of public law in the last generation. Many of the national institutions of the several States are gradually disappearing. The embassies of Prussia in Bavaria, Hamburg in Prussia, Prussia in Saxony and so on have been abolished in recent years. The law of nationality which belongs to the former epoch still stands as it was, and the necessity for reforming it is admitted in many quarters. The Report on this subject by the former Minister of Justice, Dr. Koch, supported the view that as regards nationality the *Reich* should come first and the States should have only a secondary place. Citizenship of the *Reich* should be above citizenship of a State. This should be made clear by describing Germans in their passports not, as at present, as Prussians or Bavarians, etc.,but simply as Germans (*Reichsdeutscher*), adding in brackets the State to which they belonged. In spite of violent opposition by a small minority consisting mainly of Bavarians, this proposal met with the approval of the great majority of the meeting.

The same view was taken as to nationalization. The majority held that it ought to be effected by the *Reich* and not as hitherto by a separate State.

Nationality of Married Women.—Reform is also called for as to the nationality of married women. At present if a German woman marries a foreigner she loses her nationality. This rule is based on the principle of the unity of the family. The altered position of women in the post-War period makes a change necessary here as in other matters of family law. It is no longer possible to deny to a woman who has acquired political rights the free choice of her nationality. Accordingly the proposal was agreed to that a German woman who marries a foreigner should not lose her German nationality unless she elected to take the nationality of her husband.

Rights of Property Owners.—The further deliberations of this Section were devoted to the question whether a law of the *Reich* was called for to indicate the distinction between the cases in which the rights of an owner of property could be interfered with without compensation, and those in which he must be compensated. The practical difficulty of finding a criterion led to a negative conclusion.

Betrayal of Trade Secrets.—The Commercial Section considered a series of cases in the courts concerning the betrayal of trade secrets. The points in debate were whether trade secrets ought to have greater protection and particularly whether the protection given by the Penal Code ought to be extended beyond the period of the employment. After full discussion it was decided that this extension should be recommended only when an express promise of secrecy had been a term of the contract. On the other hand, it was considered that the attempt to commit the delict should be made an offence. The creation of a special offence of " spying out " (*Ausspähung*) was not approved of.

Evidence on Oath.—The Section on Civil Procedure and Judicial

Organization was concerned with a subject of special importance as to which there has been great controversy in the press. Is it expedient that evidence on oath in civil suits and in criminal proceedings should be restricted by legislation ? In civil suits should the admissibility of proof by witnesses be limited and instead of the " oath of party " would it be better to allow the parties to give evidence either on oath or otherwise ? In order to grasp the importance of this question in Germany we have to bear in mind the extent to which German law makes use of the oath in civil and in criminal matters alike. In principle all oral testimony and all evidence by experts must be given under oath. Moreover, one of the parties to a civil suit may stake his case on the answer made on oath by the other party to the question at issue between them. This is the so-called " oath of party." The statement made thus must be accepted as decisive by the other party and by the court. It is a remarkable relic of the formal system of proof which still continues to exist, though it is in direct conflict with the principle that the judge is free to estimate the value of the evidence.[1] Apart from this special case of decisory oath the number of oaths taken by witnesses in German courts in a single day in cases of all descriptions runs into an enormous figure. That there should be a fair number of perjuries is not to be wondered at. The importance of the evidence on oath for the decision of the case and the obscurity of the law upon many points conduces to perjury. Persons who in other respects may be honest enough find themselves contending with each other about points which they do not clearly understand, and there is undoubtedly a great deal of false evidence. We hear in the press about a " veritable plague of perjury." In point of fact there has been in the post-War period a notable increase in the number of prosecutions for perjury. As against 2,058 accusations in 1912 and 2,126 in 1913, we have in 1923, 2,195, in 1924, 2,872, in 1925, 3,678, in 1926, 4,089 and in 1927, 4,627.

These figures relate only to cases which came to trial. They would be much higher if we included the prosecutions which were instituted, but were dropped or disposed of before trial. In Prussia alone in 1925 proceedings were begun against 18,870 persons, and in the following years this number was exceeded. German public prosecutors have been flooded with complaints by embittered litigants, alleging perjury on the part of their adversaries. Dr. Köhler, the Chief State Prosecutor, gave some idea of the volume of this deluge of complaints in his statement that less than 1 per cent. of them were followed up by prosecution. Such complaints are prompted often enough by hatred, envy and chicane, but in many cases they are not unfounded. Is this surprising when every statement by a witness, even as to his age, or as to the most private relations, *e.g.* in divorce proceedings or disputes as to liability for aliment, must be given on oath ?

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[1] With the German " oath of party " (*Parteieid*) may be compared the French *serment décisoire* and the Scottish " reference to oath." (Civil Code, Arts. 1358 *seq.*; Bell's *Principles*, n. 2268.) Neither in France nor in Scotland is the court bound to allow this mode of proof, but if it does allow it it must accept the declaration of the party as final. In France this method of proof is now not much used (see Japiot, *Traité Elémentaire de Procédure*, 2nd Ed., n. 812). In Scotland it is still quite common, especially in the case of an action brought on a debt which has prescribed by the triennial prescription. [Note by Editor.]

The abolition of the jury by the Decree of the Minister of Justice in 1924, and its replacement by the Lay Assessors (*Schöffengericht*) has contributed to this result. Experience shows that juries were very hostile to these prosecutions for perjury and the disappearance of juries has made the way easier and has increased the number of complaints and of consequent prosecutions. A battle was waged by the press [1] and later by the Legal Societies against this unhealthy state of matters and the Ministry of Justice lent powerful support. The Ministry in recent years, in its official directions to public prosecutors, has instructed them to look rather at the subjective side and not to institute prosecutions about unimportant matters. This has helped, but it could not of course go to the root of the matter. The law is there and, if it is to be altered, this must be done by the legislator. This short account may be enough to explain the great interest taken by German lawyers and by the public generally in this matter, and in the proposals concerning it made by the *Juristentag* with a view to amending the evil. To stay this "plague of perjury" it is necessary to alter the law which makes necessary such a vast number of judicial oaths. The Chief Prosecutor, Dr. Sturm, in his report advocated a great reduction. It did not seem to be expedient to abolish the oath altogether as a confirmation of testimony but, on the other hand, it was suggested that the oath might be reserved for the most important parts of the evidence, and for matters essential to enable the judge to come to a conclusion. It was recommended that in criminal proceedings the judge should not be obliged to put every witness on oath, that the oath might be confined to the most important part of the evidence, and that it might be administered after the testimony had been given instead of before it. In civil suits corresponding measures should be taken. It is to be noted that most of these alleged perjuries are in civil suits, and particularly in actions for divorce and claims for aliment in which facts are investigated of an extremely personal and delicate nature. Here also the *Juristentag* was in favour of restricting as far as possible the necessity of evidence on oath and for limiting such evidence to matters, the determination of which was indispensable for the decision of the case.

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[1] It is right to mention the name of Mr. Sling, the reporter of the *Vossische Zeitung*, whose early death is much to be deplored.

The so-called "Oath of party" has been already mentioned, and as to it also the *Juristentag* suggested an alteration of the law. Professor Rosenberg in his report advocated the complete abolition of the "Oath of party" as being an institution not suited to modern conditions. In its place the parties to the suit should be made competent as witnesses, and the court should be entitled to attach to their evidence whatever value it chose to give. This proposal as well as those previously mentioned relating to the law of evidence were in the end carried by a majority. It was added that, instead of the two forms of oath at present in use, namely the religious and the civil oath, there should be substituted a simple declaration "I swear it."

Petty Cases.—The *Juristentag* thus brought to a successful termination an important piece of work in a field in which on previous occasions it had been found impossible to make much progress. The last subject considered by this Section was the expediency of making special provisions for dealing with petty cases—civil or criminal (*Bagatellsachen*). There was, however, so much difference of opinion as to what cases ought to be dealt with exceptionally, and in what ways the procedure might be simplified, that it was possible only to agree upon a general principle in these terms :

> The special treatment of petty cases is not theoretically justifiable, but it is called for because without it the mass of small cases will impede the whole administration of justice. It is for those charged with reform of procedure to find the best way of relieving the ordinary courts of these matters.

It may be said in conclusion that the Reports presented to the *Juristentag* and the discussions upon them proved very valuable, and showed that the legal societies were full of vitality and activity. The resolutions which were carried cannot fail to have great weight with the legislatures, and if so the *Juristentag* will have achieved the object for which it exists.

ROAD ACCIDENTS: THE COMPENSATION PROBLEM.

[*Contributed by* SIR ALEXANDER K. BUTTERWORTH.]

THE rapid growth of automobile traffic has given rise to a number of problems which all countries are experiencing, and which none has completely solved.

The earliest problems were physical and largely mechanical—the adaptation of roads to the new vehicles and the improvement of the vehicles themselves—and mostly related to speed. Then came problems concerned with safety—partly mechanical (*e.g.* brakes) and partly legal or administrative (*e.g.* speed limits and regulations.) Lastly, the first set of problems being in great measure solved, and the second hardly at all, we are met with a third set relating to accidents—not how to prevent accidents, but how to meet the consequences when an accident has occurred. It is with the " road accident problem " in this sense that the present article attempts to deal, using the word " accident " in a perfectly general sense, as implying neither fault nor its absence.

It is in effect a problem of compensation. A road accident may, and generally does, occasion loss. This may be by destroying or damaging property, or it may be by causing personal injury or death, involving loss of earning power, temporary or permanent, and medical or surgical and funeral expenses. " If the personal injury is permanent or fatal, the economic loss may be very severe, and it may fall not only on the injured person and his family, but on his hospital, physician, tradesmen, landlord and friends, or on the community at large. The problem of compensation is concerned with the distribution of the burden of this loss."[1]

The Extent of the Loss.—The aggregate losses incurred in a single year by all the parties affected must be very great, how great we can only guess. The sums paid by insurance offices in Great Britain in respect of road accidents are not published, and apparently even the Ministry of Transport has no means of ascertaining them, for the Road Traffic Act contains no provision for returns of the working of the insurance scheme introduced by that Act—a singular and unfortunate omission, seeing that the scheme involved a completely new departure in British legislation. The payments by insurance companies, however, would represent but a small part of the national loss, even if they provided a full indemnity for the losses sustained in each case, since third-party insurance only applies to those accidents, which can be shown to have been occasioned by some negligent act or omission in connexion with the operation of the vehicle causing the injury. In the United States a leading Insurance Company puts the national loss at £500,000,000 a year—more than the annual expenditure upon education. This sounds a fabulous figure, but in a recent number of the *Bulletin of the American College of Surgeons*[1] it is stated that estimates of the losses due to automobile accidents range from £120,000,000 to £400,000,000 according to the items included, and that it is thought that they involve losses of at least £1,000,000 a year to hospitals. The number of accidents in America is some five times as great as in Great Britain, but making allowance for this and for differences in money values, it seems clear that motor accidents involve us in losses running into millions of pounds each year.

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[1] *Report by the Committee to study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences* (1932).

Whatever the amount, these losses have to be borne by someone, and the main problem is to find a fair basis for allotting or distributing the burden. From that flow subsidiary questions—the amount to be paid or received in respect of the loss in individual cases or the mode of assessing it ; the method of securing payment, when liability is established and the amount fixed, and so on.

The questions involved admit of a variety of answers, but all seem to point to one conclusion, viz., that the problem cannot be satisfactorily settled by the application of what we may call " premotoring law "—claims for damages based on negligence, determined and assessed by a jury and enforced in the same way as any legal judgment. The motor vehicle has introduced a new state of things—new risks, new rights, new duties—and these call for new laws and new remedies.

Apportionment of the Loss.—Confining our inquiry to loss through personal injury and leaving out of account for the moment third parties, such as hospitals, tradesmen and others indirectly affected, the first question is how the loss is to be apportioned between

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[1] Vol. xv, No. 4.

(1) the doers—the persons who inflict the injury, *i.e.* the motorists and their insurers—and (2) the victims—those who suffer it, *i.e.* the injured persons and their families and dependents. The question may be stated in another form, in what circumstances should the motorist (using that word to designate the driver or owner, as the case may be, of a motor vehicle which has occasioned injury to another person,) be held liable to pay damages or compensation to the injured person, for I am leaving out of consideration the alternative of State Insurance?

Three principles have been suggested for determining this question, each of which calls for consideration. They may be described as the principles of (i) Negligence; (ii) Dangerous instrument; and (iii) Compensation.

Negligence.—The first is the principle acted upon in Great Britain, in one or two other European countries (*e.g.* Belgium and Spain), and in most, if not all, of the United States of America. In those countries the rule of our Common Law, which holds a man responsible for the consequences of his want of care but ordinarily exempts him from liability when he is not shown to have been at fault, is held to be applicable to injuries caused by collisions on the road, whether the vehicle involved be horse-drawn or automobile. It lies then on the person injured to show that the driver or owner was guilty of carelessness, by act or omission. With this principle is bound up the doctrine of contributory negligence—want of care on the part of the injured person—which both in Great Britain and America may, and often does, prove fatal to a claimant's case.

Dangerous Instrument.—The second principle, often spoken of as the rule in *Rylands* v. *Fletcher*, because it was very fully and clearly enunciated in that case by a distinguished judge (Mr. Justice Blackburn), is one recognized both in English and American law. It is to the effect that a person keeping an animal or using a thing which is potentially dangerous—dangerous, that is to say, if it escapes from control—is liable for damage caused by it apart from negligence on his part. He may keep or use it, but he does so at his own risk.

This principle has not been applied to motor accidents by the judges either here or in America, and is not likely to be so applied now, although in the early days of motoring the dividing-line between a motor-car and the "dangerous animal" of the law courts must have been a narrow one. Indeed, in a recent debate in the House of Lords, the Lord Chancellor, referring to this principle, said that it did " not seem to be a very alarming or revolutionary change to apply it to a potentially dangerous machine like a motor vehicle."

In France the courts have been less indulgent, and it has been held that motor vehicles fall within a general provision in the French Code which embodies a principle very similar to that enunciated above, while in a number of Continental countries laws have been passed applying a similar rule specifically to motor vehicles.

In connexion with this principle of the dangerous instrument, the question arises whether the rule should be subject to any and, if so, to what exceptions or qualifications. Some, which are in operation in different countries, were referred to by the Lord Chancellor on the occasion above referred to, *e.g.* accidents caused by *force majeure,* by inevitable accident, by the fault of a third person or of the injured person himself, these occurrences qualifying the general rule much in the same way as the doctrine of contributory negligence qualifies the rule of liability founded on fault.

Compensation.—The third principle has not, so far as I know, been applied to road accidents as yet in any country, but it has been strongly advocated by the Committee whose report has already been quoted (*ante*, p. 189). That Committee, which included judges and other distinguished lawyers, studied in all its bearings the question of compensation for road accidents in the United States under the auspices of the Columbia University Council for Research in the Social Sciences; it pursued its studies for more than two years, during which time it investigated nearly 9,000 cases, and not only is its report a mine of information, but its arguments and conclusions are probably the most valuable contribution yet made in any country to the study of this particular phase of the motor problem. The report of the Committee, therefore, calls for the fullest and most careful consideration by all who are interested in motor legislation, although parts of it relate to questions which in this country have already been settled by the adoption of compulsory insurance. On that point it is satisfactory to note that the Committee strongly recommends the States to follow the example set by Great Britain in the Road Traffic Act, 1930.

The laws regulating the use of automobiles in America vary in the different States, but liability for accidents turns, as in Great Britain, on proof of negligence. Third-party risk insurance in respect of personal injury (spoken of as " public liability insurance ") is fairly common in practice, but is legally compulsory only in Massachusetts. Some States have enacted " financial responsibility " laws, which take the form either of requiring motorists, who have shown themselves to be careless drivers, to insure, or else of taking special steps to enforce judgments for damages arising out of motor accidents, the orders in both classes of case being made effective by depriving a defaulter of his road privileges until the order is complied with. In other States statutes have been passed giving injured persons who have obtained judgments for damages a right of action upon insurance policies.

The Committee examined the effects of legislation in a number of States, and eventually framed a scheme dealing with each of the questions involved in "the compensation problem": (*a*) the means of securing payment of compensation; (*b*) the principle upon which liability should be determined; and (*c*) the amount to be paid or the mode of assessing it.

After noting the fact that compulsory insurance has been adopted in Great Britain and in certain other European countries, and examining its effect in Massachusetts, where it was found to have largely eliminated the evil of financial responsibility without having, as often suggested, adversely affected public safety, the Committee expressed strong approval of "requiring every owner of a motor vehicle to insure against whatever liability might be imposed upon him for personal injuries or death caused by its operation." In other words, compulsory third-party insurance is recommended as the best means of insuring the payment of damages or compensation when due.

That would make the law in America substantially as it stands in Great Britain to-day, but the Report goes on to say that the Committee "believes that the remedy must go farther," and that "no system based on *liability for fault* is adequate to meet existing conditions"—that is to say, the Committee would eliminate the use of the principle of negligence. This conclusion is of special significance, because the principle of liability without fault, based on the rule in *Rylands* v. *Fletcher*, has been accepted less readily in America than in our courts. Indeed, at one time (1911) it was held that the first Workmen's Compensation Act in the State of New York was invalid, as being unconstitutional, on the ground that it was a settled principle of common law that a person could not be held accountable, unless he was at fault. That view, however, has not prevailed, and the Report enumerates a number of examples of "liability without fault."

In view of the adverse criticism which the suggestion that motorists should be made liable for road accidents independently of negligence has met with in certain quarters in this country, in spite of Continental practice, the passages in the Report dealing with this part of the subject are of special interest. The Committee goes much further than merely basing its conclusions on the rule in *Rylands* v. *Fletcher*. On the general question of liability without fault the Report says:

> The Committee believes that the principle of negligence is a principle of social expediency, and that it is not founded on any immutable basis of right. . . . The value of either principle [*i.e.* the principle of negligence or the principle of liability without fault] is to be tested by its results rather than by *a priori* moral considerations;

while with regard to the particular case of motor accidents the Report points out that in these "the principle of negligence is peculiarly difficult to apply," seeing that

> it is almost impossible for witnesses, even though they have not been participants in the accident, to remember and to reproduce exactly to the jury swiftly succeeding events which they have been neither trained nor prepared to observe.

The Committee lays great stress on the analogy of the Workmen's Compensation Acts, which in America, as with us, give compensation to injured employees irrespective of negligence on the part of their employer. The first of these Acts, following the European precedents, was passed early in the century, and has been followed by similar enactments in nearly all the States. These laws, the Report says, were adopted,

> not because of a theoretical preference for the principle of liability without fault, but because it had become imperative to discard a system which worked very badly, and to try in its place a new system which gave promise of success. . . . A serious effect of this [*i.e.* the old] system was that it cast a heavy burden upon injured employees and their families.

The Report proceeds:

> In many respects there is a close analogy between the industrial situation, where workmen's compensation has been developed, and the motor vehicle situation, where the application of a like principle is now being discussed. Accidents are inevitable, whether in industry or in the operation of motor vehicles. It has been accepted as sound policy that the major part of the cost of accidents to employees should be borne by the industry, and it is proposed that the major part of the cost of those caused by the operation of motor vehicles should be cast upon the persons for whose benefit the motor vehicles are being operated. The conditions

calling for the application of the compensation plan are similar, viz., the failure of the common law system to measure up to a fair estimate of social necessity.

In reply to the argument that the justification of the Workmen's Compensation laws was to be found in the contractual relationship between employer and employee which does not exist in the case of road accidents, the Report says:

> The insistence on the importance of this relationship magnifies the *source* of the economic evils sought to be adjusted and gives too little attention to the evils themselves. It is with the *consequences* of these accidents that the Committee is concerned, whether death or disability, with its train of distress and suffering and want, be caused by the operations of a machine in a factory or a motor vehicle on the road.

In effect the result of the Committee's proposal is to substitute for the present system of " damages imposed for fault " a system of "compensation given for accident." The question is looked at wholly from the point of view of the victim; it ceases to be a question of law and becomes one of social and economic policy. Someone has met with an accident; is it fair or socially desirable that he shall be compensated? If so, the only remaining question is " by whom," and the answer to that is given in the passage quoted above.

Take the case, by no means imaginary, of a child going to school being crippled for life by a car which mounts the footpath. The State insists that the child shall go to school; it provides no means of getting there other than the one made use of by the child; at the same time it authorizes the use of the road by vehicles which are known not unfrequently to mount footpaths.[1] The question is whether the right of the child or its parents to compensation should depend upon their ability to prove negligence on the part of the driver, or whether it should turn upon some much broader principle. So stated, it is hard to see how the question can admit of more than one answer.

As to the amounts to be paid to injured persons and the mode of their assessment, the Committee does not favour any attempt to arrive at a precise computation of damages on the basis of a complete indemnity for loss, but recommends compensation subject to definite maxima, and fixed, as far as possible, by a statutory scale, as in the Workmen's Compensation Acts, based in the main on earning capacity, with an allowance for medical and funeral expenses. The Report emphasizes strongly the advantage of reducing to a minimum the elements of delay and expense incident to the present system. *Bis dat qui cito dat* is a principle which seems to apply with special force to injury in road accidents.

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[1] According to the Metropolitan Police Returns in 1931, twenty-four people were killed in London alone by motor vehicles mounting the pavement, and if the ratios, in road accidents generally, of London to the Provinces and of killed to injured may be taken as a guide, the total casualties in Great Britain from this class of accident can hardly fall short of 3,000 a year.

Thus, the Committee's scheme is summarized as a "plan of compensation with limited liability and without regard to fault, analogous to that of the Workmen's Compensation laws," and its framers claim that

> such a plan would eliminate the use of the principle of negligence, would place the burden of economic loss on the owner or operator to whose activity the loss is chiefly due, would provide for an equitable distribution of the insurance fund according to the extent of the economic loss, and would provide a prompt remedy at small cost to the injured person or his family.

The scheme, of which the Report contains a draft worked out in considerable detail, is certainly very attractive, and seems to supply a better basis for the settlement of the "compensation problem" than any heretofore put forward.

It may be interesting to compare it with the Road Traffic (Compensation for Accidents) Bill, introduced into the House of Lords last Session by Lord Danesfort, the second reading of which was carried after a division. Of the three outstanding features of the American scheme—viz., 1, compulsory insurance; 2, liability without fault, and 3, limited and readily ascertainable compensation—the first is already in force here by virtue of the Road Traffic Act, 1930, while the second is the principle upon which the Bill is based. That principle is qualified, however, by the exception of accidents caused entirely by the negligence of the injured person, whereas under the Committee's scheme compensation is payable in respect of all injuries not intentionally brought about by him. The third feature marks the most material difference between the two, since the Bill leaves the existing law and practice as to the assessment of damages untouched. Another difference is that the Bill does not extend to injuries caused by one motorist to another; in fact, it was avowedly introduced in the interest mainly of pedestrians.

Accidents to Motorists.—It seems doubtful whether in England there is any case for altering the law as regards injuries sustained by motorists themselves, since when one motor vehicle causes injury to persons in another, the question of liability will generally be one to be decided between the two insurance companies, and in the long run the burden to be borne by the insurance companies as a whole will be the same whether liability in individual cases is determined on the basis of negligence or of liability without fault. Indeed, it may be doubted whether as a body motorists would see any advantage to themselves in being brought under a scheme of "compensation with limited liability without regard to fault." In any case, the question seems one to be decided largely according to the views of the motoring organizations.

But with regard to other users of the highway, there seems much to be said in favour of the scheme of the American Committee on the two main points on which it differs in principle from the English Bill, viz., liability for all injuries not intentionally brought about by the injured person and a pecuniary limit to the liability. The pecuniary limit would remove or greatly weaken one objection raised to the Bill by facilitating the fixing of premiums, while the elimination of the exception of accidents caused by the negligence of the injured person would greatly simplify procedure and reduce litigation and delay.

Funeral Expenses.—There is one small improvement which the American scheme would bring about in English law. It has been held by the courts that funeral expenses do not come within Lord Campbell's Act : the funeral, therefore, of a man killed on the road has always to be paid for by his representatives ; under the proposed scheme funeral expenses, when incurred, would be payable by the insurance company.

Of the parties other than the injured person and those dependent upon him, to whom a road accident may occasion loss, it would seem that only those who can put forward a claim for special consideration, so far at any rate as legal enactment goes, are those who have bestowed time and trouble, or incurred expense, in making good the damage done—that is, doctors, who have rendered emergency aid to the injured persons, and hospitals, which have admitted them for treatment.

Medical Expenses.—Medical practitioners and hospitals alike complain that they receive a very small proportion of the amounts due to them for their services, and they seem to meet with no better treatment in America than they do in this country. A clause was introduced into the Road Traffic Act for the protection of hospitals, which provides that whenever an insurance company makes a payment under a third-party risk policy in respect of the death of or personal injury to a person treated in a hospital, the company shall also pay to the hospital the reasonable expenses incurred in such treatment up to £25, but it has been authoritatively stated that the amounts received by the hospitals under this clause represent only about 10 per cent. of the expenses incurred by them.

At the meeting of the British Medical Association held in London last July similar complaints were made by country practitioners in regard to emergency treatment, and after full discussion a resolution was passed in favour of representations being made to the Government to assume responsibility for such treatment.

The difficulty of the hospitals no doubt largely turns on the question of negligence discussed above. A hospital can only claim under the Road Traffic Act when the insurance company has met the claim of the injured party in whole or in part ; insurance companies only meet claims when they are legally liable or think that a jury may hold them to be liable, and they are only liable when the insured motorist can be shown to have been negligent. A hospital should be paid for its services by those who can afford to pay, apart from any question as to the person to blame for the occurrence which has rendered hospital treatment necessary, and the fact that it would help to secure to the hospitals a larger measure of justice is an additional argument in favour of eliminating the issue of negligence from claims by the victims of road accidents, while an amendment of s. 36 of the Road Traffic Act might serve to meet some of the difficulties which hospitals have experienced in their attempts to secure, under the provisions of that section, what Parliament undoubtedly intended to give them.

The grievance of the doctors is more difficult to remove, since there is no provision in their favour in any Act of Parliament. From all accounts the gratitude of persons injured in road accidents, whether it be smothered by pity for themselves or by anger against those who have caused their injuries, seems to be short-lived or non-existent ; yet a doctor, hurriedly summoned to attend to an injured person at the roadside, can hardly stipulate for pre-payment of his fee.

Properly safeguarded, there seems much to be said for medical fees, as well as hospital expenses, being guaranteed by the State, leaving the State to recover the sums paid from the injured persons, so far as they are in a position to pay them. The State has (presumably from motives of national policy) deliberately authorized a condition of things on the roads which involves personal injury on a huge scale; the dictates of common humanity oblige both doctors and hospitals to afford prompt relief to the sufferers; surely the loss or expense involved in such relief should not fall on those who provide it, especially when the accidents and injuries, both in frequency and severity, are on such a stupendous scale. An arrangement is already in force in some counties and boroughs, under which the police, if they think medical services are required, call in a doctor and make themselves responsible for his fee, while the Government undertakes to make good one half of the expense incurred by them.

In the absence of some such arrangement the most practicable remedy seems to be an enactment in favour of medical men on similar lines to the hospital clause in the Road Traffic Act. In some of the American States, where insurance against third-party risks is not compulsory, efforts are being made to secure in respect of both hospital and medical services a statutory lien on any damages or compensation payable to the injured person, following the precedent of some of the Workmen's Compensation Acts. With us, however, a provision on the lines of s. 36 (2) of the Road Traffic Act seems simpler and better, especially in view of the fact that the amount recoverable by doctors for emergency aid will generally be too small to admit of much expenditure of time or money on the work of collection.

The weakness of either remedy is that so long as the principle of liability for negligence only is made applicable to road accidents, the remedy will only be available in a certain proportion of cases. Thus, all grievances—alike those of victims, hospitals and doctors—seem to call for the elimination of that principle from questions relating to road accidents.

To sum up: (1) The " compensation problem "—the question how the burden of loss involved in road accidents should be distributed—calls loudly for solution: it is not satisfactorily solved by the application of the law of negligence, even when supplemented by compulsory third-party risk insurance.

(2) The most promising solutions are those based on the elimination of the principle of negligence, coupled with compulsory insurance. Without limitation of some sort, this might throw an excessive burden on the owners or drivers of motor vehicles, for it would mean legal damages (*i.e.* a payment based on full indemnity against loss) in all cases of injury arising out of road accidents. The formula,

therefore, requires some qualification, and this might take the form either of (i) exceptions to the general rule—*e.g.* no payment to be made in respect of injury caused solely by the negligence of the person injured, or by the act of a third person, etc., or (and preferably, as it seems to me) (ii) pecuniary limitation of the amount to be paid (*e.g.* scales of compensation such as those in the Workmen's Compensation Act) without any qualification of the generality of the liability—in other words, the qualification might take the form of limiting either the number of accidents to be paid for or the amount of compensation to be paid in respect of each accident.

(3) There is one class who should not bear any part of the collective burden—viz., those who only come into the picture as helping to cure or relieve resultant suffering—doctors rendering emergency aid and hospitals. The remuneration for their services or the defraying of their expenses might either be guaranteed by the State or secured by some special statutory provision giving them a direct claim upon any fund available, such as insurance money or damages awarded by a legal tribunal.

THE STUDY OF COMPARATIVE LAW IN GREAT BRITAIN.

[*Contributed by* JOHN C. GARDNER, ESQ., B.L., Ph.D., F.S.A.Scot.]

IN the *Journal of Comparative Legislation and International Law* for November, 1929, there appeared a most interesting article on Comparative Civil Law in the Universities by Professor J. Eggen van Terlan, of the University of Bonn, in which he dealt with the study of Comparative Law in the Continental Universities of Germany, France, Spain, Italy, Holland and Belgium. He showed how, in these countries, there was a movement to reform legal education and bring it into line with the requirements of modern life and the increasing number and complexity of international relations, as well as to provide a better professional training for future judges and administrators.

When we come to look into what is being done in this direction in Great Britain, however, we find a very different position of matters. In England the study of Comparative Law is taught only in the Universities of London and Cambridge. At the former the subject is Comparative Jurisprudence, being the more philosophical aspect of the subject and differing in that respect from the teaching of Comparative Law on the Continent. At Cambridge the course is on the Sources of Comparative Law, and there is also a course on Comparative English and Roman law. The London School of Economics provides a course on Comparative Industrial Law, but these few courses appear to represent the only teaching of Comparative Law in England. In Scotland the position is even worse, for there is no course of Comparative Law at any of the Scottish Universities, and no facilities for studying it.

The reason for this state of matters in England is attributed by Professor Gutteridge in an article [1] on " The Value of Comparative Law " to the attitude of the English legal mind towards foreign law and foreign legal methods, which he describes as being in general a blend of suspicion and a certain degree of contempt. " The explanation of this aspect of English legal mentality," writes[1] Professor Gutteridge, "is to be found, as Maitland has said, 'in our very complete and traditionally consecrated ignorance' of foreign law. But it seems to require justification, because law as a branch of learning stands alone in this respect. In the case of Letters, Natural Science, Economics, Music, Art, and even in the case of a vocational subject such as medicine, there is not, and never has been, the same reluctance to cross national frontiers. Even the Anglican theologians, who are in some respects the most nationalist of all divines in their outlook, have escaped from the bonds of extreme insularity. Quite frankly, I am puzzled by this attitude on the part of our lawyers. What would have been the fate of the art of healing, if our physicians and surgeons had taken up the same position? It is inconceivable that a pathologist should, for instance, decline to employ certain apparatus or specimens solely on the ground that it was derogatory and unpatriotic to employ materials imported from abroad. Law is, of course, not in *pari materia* with medicine, but how useful the assistance of foreign law can be in determining a new point of principle is shown by such cases as *Bechervaise* v. *Lewis* (1872) L.R. 7 C.P. 372, and in particular by the masterly judgment of Kotzé, C.J., in *Lewis* v. *The Salisbury Gold Mining Co.* (1894), 11 C.L.J. 137, which should be read by anyone who has any doubts on this question."

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[1] *Journal of the Society of Public Teachers of Law for* 1931, p. 26.

To some extent the same reason may be accountable for the neglect of the study of Comparative Law in Scotland, but I am inclined to attribute this neglect in Scotland much more to a peculiarity of Scottish character and the almost universal pecuniary necessity for the Scottish law student to qualify for his profession in as short a time as can be consistent with the obtaining of a sound education. The peculiarity to which I refer is the predilection of the Scots for the practical in preference to the theoretical, a preference which is nowhere better illustrated than by their legal works and writers. Of the latter, with the exception of the late Professor Lorimer and perhaps Mr. W. Galbraith Miller, it cannot be said that any have achieved an international reputation as jurists. They have been concerned only with the practice of the law and with the practice of only Scots law. This may appear to be very like the attitude of the English legal mind to foreign laws, but it is not quite the same. The Scots lawyer did not despise foreign law. He merely failed to perceive its importance, and yet at one time quite a number of

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[1] *Journal of the Society of Public Teachers of Law for* 1931, p. 26.

Scottish students studied law at the Sorbonne and at Leyden University.

At the present time, however, there appear to be three main reasons for the neglect of Comparative Law in both England and Scotland, and a fourth reason which applies more particularly to Scotland. The three main reasons are: (1) failure to realize the value of and need for the study of Comparative Law; (2) the present-day tendency to regard the subject of a profession as nothing more than a money-making equipment; and (3) the pecuniary necessity for restricting the legal education of most students to a primarily practical one. The fourth reason, which is applicable more to Scotland than England, is the fact that the law professors and lecturers of the Scottish Universities are almost all practising King's Counsel, Advocates, or Solicitors. As such, they are particularly adapted to teach such subjects as Scots law, Conveyancing, and Evidence and Procedure, but equally unadapted to teach subjects which do not come within the scope of their other work. It stands to reason that a busy professional man cannot successfully teach an ever-changing and ever-developing subject which has no relation to his professional activities, for he has not the time to study it sufficiently thoroughly himself or to keep himself abreast with its perpetual developments. Such a subject as Comparative Law is a whole-time study, and could never be successfully taught by anyone engaged also in exacting professional activities. This means that if a chair in Comparative Law was to be instituted at one of the Scottish Universities it would have to be sufficiently well endowed to make it acceptable as a whole-time appointment—no easy matter in these times, especially when the need for this study has not yet been properly realized.

It seems to me, however, that the necessity for a knowledge of Comparative Law on the part of British lawyers and statesmen concerned with international affairs, cannot long remain unrealized, and when that realization does come we shall most likely, as usual, be found unprepared. At present in Great Britain the *Journal of Comparative Legislation* is the only organ affording a means of acquiring some idea of the scope, value and developments of Comparative Law, for those who are not in a position to take the classes in it at London and Cambridge. I venture to suggest that considerable benefit might accrue if a short series of lectures in Comparative Law could be given at each of the English Universities possessing no class in that subject, and at all of the Scottish Universities. The object of such lectures would be rather to demonstrate the importance of the subject, and the necessity for its study, than to provide a course in it. If the English and Scottish Universities were to co-operate in such a project the lectures could be delivered by one lecturer for all the Universities concerned over a period of two or three years at a very small proportional cost. These lectures, if allowed sufficient publicity, might lead, or at least pave the way to additional courses in Comparative Law being established in England and a course provided in at least one of the Scottish Universities.

The importance and necessity for a knowledge of Comparative Law, more particularly in connexion with the making and interpretation of international treaties, is shown by Professor van Terlan in the article already referred to, and Professor Gutteridge in his article on the Value of Comparative Law emphasizes its importance: (1) as a factor in our relations with other countries; (2) its utility to the law reformer, and (3) its place in a scheme of legal education. It is as a factor in our international relations that I am chiefly concerned in demonstrating its value, but little can be added to the concise paragraph in which Dr. Gutteridge expressed the case for this aspect of the subject. "The case for Comparative Law in relation to our national interests may, I think, be stated in this way," he writes.[1] "The mechanical developments of the nineteenth and twentieth centuries have undoubtedly brought the nations very much closer together. The world seems to be tending to develop into an economic unit, and it is no longer possible for Great Britain to stand aloof in an attitude of isolation from Continental legal thought. We are committed, for weal or for woe, to a policy of international co-operation in many fields, which carries with it the assumption of treaty obligations coupled, in many instances, with the necessity for the amplification or the amendment of our own law. Unless we are in a position to understand the structure of foreign law, the meaning of foreign legal terminology, and the mentality of foreign lawyers, we may easily be faced with very difficult and embarrassing problems. The perils which are attendant on a policy of legal isolation were illustrated in a striking manner by the disillusionment of the German lawyers when they were faced with the fact that the Treaty of Versailles was not to be interpreted, as they had somewhat naïvely supposed, in accordance with German conceptions and German methods."

Professor Gutteridge's article was first read as a paper at the annual meeting of the Society of Public Teachers of Law in Lincoln College, Oxford, on July 11, 1931. In the subsequent discussion which followed the reading of this paper, Mr. S. G. Vesey-FitzGerald, a member of the Council of Legal Education, pointed out the importance of Comparative Law in the present-day problems of the British Empire, whose administrators we had to train. "For the right understanding of any one of the immense variety of systems by which the King's subjects lived, the comparative method was necessary," he said. "In particular the study of primitive law, vitally important for tropical Africa, required constant comparison with more civilized systems to prevent it from degenerating into anthropology." In purely British comparisons, he gave as instances the argument in *Whiteley* v. *Delaney* [1914] A.C. 132, which might have been strengthened by a reference to *Gokaldas* v. *Puranmal* (1884) 10 C. 1036 P.C.; the debt of the Indian Codes (including the Partnership Bill, 1931, and the Specific Relief Act) to Scots Law; and the recent action of the Colonial Office in superseding the Indian Penal Code by English Criminal Law in certain colonies, instead of attempting to combine the best elements of the two. He dealt finally with the charge that Comparative Law is nebulous and inconclusive, and attributed this charge to the vastness of the field. The comparative lawyer, he said, must be one who could co-operate with others, and the solution was to be found in team work.

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[1] *Ubi supra*, pp. 28 and 29.

The above quotations from Professor Gutteridge's article and the remarks made by Mr. Vesey-FitzGerald illustrate very well the importance of Comparative Law both internationally and within the Empire. It seems to me, however, that there is another aspect of its importance in our international relations which has not been mentioned by Professor Gutteridge. He has shown that the ever-increasing complexity of international relations and of the inter-dependability of nations will call for extensive developments in International Law, and that Britain will no longer be able to maintain her attitude of isolation. But what I think should be stressed rather than Britain's danger from legal isolation is her obligation, as one of the world's greatest nations, to take a leading part in the development and administration of the International Law of the future. To do so, a knowledge of Comparative Law—involving, as it does, not only the knowledge of other systems of law, but also a balanced judgment of their relationship to each other and our own, and of their respective merits and demerits—is essential. It is not unreasonable to believe that in law lies the only hope of the ultimate abolition of war. Indeed, this contention is advanced by Sir John Fischer Williams in his book, *Chapters on Current International Law and the League of Nations.*[1] While such an end cannot be brought about by the efforts of jurists alone, it lies with them to develop and devise a system of international rules which, from the very perfection of their equity and internationality, will achieve the victory of law over war. If Britain is to play her part in this achievement she must be brought to a realization of the importance of and necessity for the study of Comparative Law.

Note.—The foregoing article was written a considerable time before the International Congress of Comparative Law at The Hague from August 2–6, 1932. At that Congress the increasing interest now being taken in England in Comparative Law was most satisfactorily manifested by the British delegation, which was distinguished both by the eminence of its members and the fact that it contained representatives from every branch of the legal profession. Unfortunately, however, this delegation served also to emphasize the lack of interest still existing in Scotland in Comparative Law, for, with the exception of Lord Macmillan and the writer, all the members of the British delegation were English. A Scottish committee in connexion with the Congress was formed by Professor Candlish Henderson of Edinburgh University, containing such eminent members as the Lord President of the Court of Session, the Dean of the Faculty of Advocates, and the Depute Keeper of the Signet.

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[1] Longmans, Green & Co., London, 1929.

THE PROVINCE OF TORT IN ENGLISH LAW.[1]

[*Contributed by* EDWARD JENKS, ESQ., D.C.L.]

ORDER being of the essence of law, and caprice its antithesis, every system of law tends to develop norms or types; and these norms inevitably, in the course of time, beget classifications. Whether these classifications are, as the phrase goes, 'purely academic,' or whether, borrowing the element of compulsion which is also involved in the concept of law, they become practical, is often matter of debate, and is an important question in many cases. But, in either view, these classifications are of interest.

English law is, of course, no exception from the rule. Early textbooks of English law, being concerned much more with remedies than with general principles, naturally make the former their basis of classification. We get from them (1) Pleas of the Crown and (2) Common Pleas —not (1) Crimes and (2) Private Wrongs; (1) Real Actions and (2) Personal Actions—not (1) Property and (2) Obligations. And this latter classification continued until nearly the end of the sixteenth century; while the former may be said to be familiar under its modern titles of Criminal Law and Civil Law even at the present day.

Towards the end of the sixteenth century, however, there came a great change in civil procedure, which produced, ultimately, a new classification. This change was principally caused by two facts: (1) the almost total disappearance, for technical reasons, of Real Actions, which survived, in fact, only in purely fictitious proceedings like Common Recoveries, and (2) the evolution, under cover of the personal Action of Assumpsit, or Case, of the new phenomenon of the simple or formless contract, based on the doctrine of valuable consideration. This latter development was not merely a great procedural reform, substituting, for the archaic Action of Debt, the far simpler and more efficient Action on the Case in Assumpsit. It was a great contribution to the substantive law, not only of England, but of those many other communities which have adopted it. Quite naturally, the attention both of lawyers and the commercial and business classes of the community was attracted to it; and people began to speak familiarly of 'claims in contract,' and then, as an inevitable consequence, to cast about for at least one other title, to make a dichotomy. At first, the tendency seems to have been to insist upon the contrast between (*a*) *special assumpsit*, where there had actually been an express contract between the parties, and (*b*) *indebitatus assumpsit*, which, at any rate after the decision in *Slade's Case*,[1] was allowed in almost all cases in which the defendant was alleged to owe the plaintiff a liquidated sum. But this distinction disappeared early in the seventeenth century.

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[1] *The Province of the Law of Tort* (Tagore Law Lectures delivered in 1930), by Percy H. Winfield, LL.D. Cantab., Hon. LL.D. Harvard. (Cambridge: at the University Press, 1931.) Pp. xii + 254. Price 12*s.* 6*d.* net.

As the concept of Contract became clearer (again not merely among lawyers, but the thinking public generally),[2] it became more and more obvious that there were many causes of action which could not by any stretching of language be fitted under either of these heads ; and this despite the fact that many of them fell to be remedied under the Action of Assumpsit. Take, for example, the liability of the innkeeper and the carrier. No doubt the negligence of such persons in respect to the goods entrusted to them could be twisted into a breach of an implied undertaking to safeguard such goods. But what about a refusal to receive the goods or person of the plaintiff at all ? At the commencement of the seventeenth century, it was clear that an Action of Case lay against such persons, by the custom of the realm, for such a refusal. It could scarcely be argued, even before a tribunal not at all disposed to press the claims of logic, that such persons had undertaken to do what, in fact, they had refused to do. Still clearer was it that, for example, in the new and popular actions of Malicious Prosecution and Defamation, to say nothing of the wholly distinct action of Trespass, there could be no possibility of grounding the plaintiff's claim on breach of promise or undertaking.

In their difficulty, lawyers fell back upon a familiar old word, which at one time had served as an untechnical description of any unlawful harm, almost equivalent, in fact, to the word ' wrong.'[3] This was the word ' Tort ' (*i.e.* twisted, as opposed to what is straight, and, therefore, right). It is a perfectly ordinary example of the specialization of words ; and the legal public jumped, somewhat hastily, to the conclusion that all civil wrongs—at any rate all civil wrongs for which an action lay at Common Law—could be listed under one of the two heads, Contract and Tort.[4] A later generation, anxious to find a philosophical justification for this dichotomy, pointed out, also somewhat hastily, that while a claim on Contract alleged a breach of right *in personam*, a claim in Tort postulated a breach of right *in rem*. And so we get the familiar classification of our textbooks on General Jurisprudence, that breach of Contract is a violation of a right *in personam*, while a Tort is a breach of a right *in rem*, or, looking at it from the point of view of the defendant, of a general duty.[1]

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[1] *Slade's Case* (1601), 4 Rep. 94.

[2] The works of Hobbes and Locke are sufficient evidence of the influence of the concept of Contract in the thought of the later seventeenth century.

[3] The expression ' *à son tort et damage* ' is familiar to all students of the Year Books. The word in this sense is at least as old as the beginning of the fourteenth century (S.S. XVII, 11, *Paris* v. *Page* ann. 1308).

[4] It is, of course, admitted that Bracton threw out the suggestion that pleas were either *ex contractu* or *ex delicto* ; and ' delict ' and ' tort ' are fairly convertible terms. But it seems to be agreed that this was a mere rhetorical flourish of Bracton, though it may have influenced the lawyers of the seventeenth century. There was no English Law of Contract in Bracton's day.

It is at this point that the Tagore Professor takes up the running; and he has little difficulty in showing that the accepted dichotomy will not cover the ground. But, before proceeding with his task, he must evidently answer a preliminary question: What is a Tort? A Contract may be defined with general concurrence as an agreement, by which one person promises to another, either for valuable consideration or under the solemnity of a sealed document, to do or abstain from doing an act or series of acts. Such a promise, apart from question of illegality or seriousness of object, absence in certain cases of written evidence, and other casual objections, will found an action for damages, and, in appropriate cases, for specific performance, and/or an injunction. But can we say the like of a Tort?

After some hesitation, Professor Winfield commits himself (p. 32) to the definition that "tortious liability arises from the breach of a duty primarily fixed by the law: such duty is towards persons generally, and its breach is redressible by an action for unliquidated damages."

Now this so-called definition is, in the writer's humble opinion, open to two objections. In the first place, it is not a definition at all, but a series of statements about the subject which is supposed to be defined. A definition, *ex vi termini*, draws a boundary (*finis*). It includes every member of the subject class and excludes every non-member. But unless we put upon the words 'persons generally' an extremely limited and artificial meaning, then, according to Professor Winfield, seduction, obstruction of a public highway, the so-called 'absolute liability' of *Rylands* v. *Fletcher*,[2] and waste, are not torts; for they can only be vindicated by certain very limited classes of persons.[3] On the other hand, the liability of husbands, infants, and lunatics for 'necessaries,' and of an adulterer in a divorce action, are, according to Professor Winfield's definition, torts, which is certainly not in harmony with generally accepted views.

This objection is, however, of comparatively little importance. The real objection to Professor Winfield's definition is, that it is purely procedural. It does not tell us what a Tort is; it merely tells us how a Tort may be vindicated. And this, though a matter of importance to lawyers, is a matter of indifference to the layman. He (the layman) wants to know whether he can get a remedy for a loss inflicted on him by an individual or a corporation, a loss which may have ruined him. What are we to tell him ? Are we, despite the fact that the Uniformity of Process Act, the Real Property Limitation Act of 1833, the Common Law Procedure Acts, the Chancery Reform Acts, and the Judicature Acts are supposed to have abolished all archaic technicalities of procedure, to tell the layman that, without a knowledge of legal forms, he cannot hope to understand what a tort is ? Or, on the other hand, can we, as we can in the case of a contract, give him a definition which the educated layman of average intelligence can grasp, and upon which he will be safe in acting ? Must we tell him that no one but a professional lawyer can say whether or not the loss inflicted on him by the action or inaction of a neighbour will entitle him to a remedy by civil action against that neighbour, unless it takes the form of a breach of contract ?

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[1] Professor Winfield's insistence that wrongs are a much more natural basis for a classification of remedies in early law than rights (*op. cit.*, p. 205) is admirable. The writer may be permitted to point out that he had partly anticipated it in a work published many years ago (*Short History of English Law*, p. 14).

[2] On the other hand, liability for the harm done by dangerous animals is certainly tortious; for anyone who is harmed can bring the action.

[3] *E.g.* in seduction only the employer (if any); in obstruction only the person who has suffered a special and peculiar loss; in the *Rylands* v. *Fletcher* class of cases, only adjacent landowners.

Now it is well known to those who are interested in the theory of English law, that there are two rival schools of thought which give to these questions answers which it is difficult, if not impossible, to reconcile, even when mutual misunderstandings have been cleared away. One of these schools takes the view that, until a certain kind of injurious act or omission has been definitely made the basis of a successful action in a precedent-creating court, it is impossible to class it as a tort, and to advise a client that he may safely bring an action to remedy the loss which he has suffered from it. Members of this school do not, as Professor Winfield seems inclined to think,[1] regard the list of torts as closed. That would be absurd in the face of decisions like *Lumley* v. *Gye, Conway* v. *Wade, Quinn* v. *Leathem* and *Wilkinson* v. *Downton ;* at any rate, in so far as the present writer may be regarded as a member of this school, he holds no such view. All that he, and those who think with him, maintain is, that it is impossible at present to formulate a test which will ensure the recognition by the court of any claim in tort, unless a substantially similar claim has previously received recognition by a precedent-setting tribunal. The lawyer who acts on the contrary view, in their opinion merely invites his client to a gamble. If luck is on his side, the client will not only benefit himself but future sufferers. But he must be prepared to run a grave risk ; for the odds are heavy against him.

The rival view, which, it is well known to jurists, is favoured by no less an authority than Sir Frederick Pollock,[2] holds that it is possible to formulate a test ; though whether as an ideal to be striven for, or as an actual statement of the existing law, is not always easy to discover. It is formulated by the Tagore Professor in the following words :

> All injuries (*semble,* not arising out of contract or quasi-contract) done to another person (*semble,* a person other than the doer of the injury) are torts, unless there be some justification recognized by law.

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[1] *E.g. op cit.*, p. 33.

[2] *The Law of Torts* (Stevens & Sons). Quotations are from the 13th edition, dated 1929.

Now it hardly seems unfair to say that there are two obvious ambiguities in this statement. In the first place, what is meant by 'injuries'? If by 'injury' is meant, as the word implies, an act or omission contrary to law (*jus*), then it is not surprising that it should support a legal remedy; though whether the precise legal remedy known as an action of Tort is more doubtful. We must, therefore, assume that by 'injury' in this definition, Professor Winfield means loss or damage. In the second place, the words 'unless there be some justification recognized by law' seem to deprive the alleged principle of most of its value; for it, obviously, did not guide the plaintiffs aright in *Mogul S.S. Co.* v. *McGregor, Gow & Co.*,[1] which, in effect, held that persons could with impunity be guilty of a civil conspiracy, provided only that they intended to make money by it. In other words, Professor Winfield's saving clause deprives his 'principle' of most of its value.

Let us apply this reservation to one or two decided cases.

In *Giles* v. *Walker*[2] a careless farmer allowed thistles to grow on his land, and failed to cut them before they ripened. As a natural consequence, the thistle seeds were blown on to a neighbour's farm, where they did appreciable and direct damage. The neighbour brought an action of Tort against the careless farmer. The action was dismissed. Are we to conclude that the law 'justifies' careless farming?[3] It will be remembered that Professor Winfield does not postulate, as an element in tortious liability, any intention to cause harm. He could, in fact, hardly do so in face of the common tortious liability for negligence.

In *Bradford Corporation* v. *Pickles*[4] it was alleged that the defendant exercised his *primâ facie* right as a landowner to draw off water naturally percolating through his land, with the sole object of blackmailing the plaintiffs (whose public reservoirs were threatened by the defendant's action) into buying his (the defendant's) land. The House of Lords held that there could be no action of Tort on such an allegation. Does the law 'justify' blackmail?

These three cases, of which two were decisions of the highest tribunal in the land, would appear to be difficult to reconcile with the 'principle' stated by Professor Winfield; and it is not difficult to imagine similar cases. But, leaving aside for the present hypothetical cases, we would suggest, with all respect, that Professor Winfield's 'principle' appears to amount to little more than an assertion, that if loss or harm is unlawfully inflicted, it will give rise to an action for damages, but if it is lawfully inflicted it will not. The question is: what *is* unlawful harm or (in Professor Winfield's language) 'injury'?

Melius est petere fontes. In his valuable chapter on *Principles of Liability*,[5] Sir Frederick Pollock builds up his thesis on the proposition, admirable from an ethical or moral standpoint, and for which he quotes in support 'the whole modern law of negligence,' [1] that it is incumbent on "fellow citizens to observe in varying circumstances an appropriate measure of prudence to avoid causing harm to one another." And from this principle he argues, *a fortiori*, "much more must there exist the negative duty of not doing wilful harm."

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[1] [1892] A.C., 25.

[2] (1890) 24 Q.B.D. 652.

[3] That was certainly not the view of the Court of Appeal in *Wedd* v. *Porter*, [1916] 2 K.B. 91, though that was an action by a landlord.

[4] [1895] A.C. 587.

[5] *Op. cit.*, pp. 20–53.

Without dwelling on objections to the conclusiveness, in view of the actual development of English law, of this *a priori* type of argument,[2] we may appeal to the generally admitted view of jurists, that positive law is apt to lag a good way behind positive morality, though there are, undoubtedly, cases in which English law is ahead of it. But it is perhaps better to make an attempt to apply Sir Frederick Pollock's test to specific cases. And, as we have quoted actual decisions against Professor Winfield, we may be permitted to test Sir Frederick Pollock's view by putting three hypothetical cases, which might happen any day, offering to be bound in advance by his judgment as a lawyer whether they would give rise to actions of tort. They could clearly found no other civil remedy.

Case 1. A is prosecuted for theft. He is, in fact, wholly innocent, but circumstantial evidence is against him. B, an enemy, deliberately and voluntarily makes statements in the witness-box with the intention of getting A convicted. A is convicted mainly on B's testimony, and receives a sentence of penal servitude. A year later, it is discovered that B's evidence was false; and he is convicted of perjury, while A receives a pardon and is released.

It can hardly be doubted, in this case, that (1) B was guilty of wilful harm to A (2) by a breach not merely of the civil, but of the criminal law. Would Sir Frederick Pollock advise A to bring an action of Tort against B, who in fact is well able to pay damages? If not, what are the 'necessary exceptions' which would render the action perilous? It can hardly be an objection that perjury is a crime, for many crimes are, admittedly, torts. Nor can it well be suppposed that B could successfully plead legal or moral 'justification.'

Case 2. A, a tradesman in a provincial town, has an account with the Z—— Bank, in which his credit balance is £235. B, having become possessed of A's pass-book and cheque-book by theft, forges A's name to a cheque for £180, which is duly paid by the bank. Some days later, A, believing his balance to be still £235, sends a cheque for £87 to one of his most important creditors, in discharge of a trade account. The cheque is returned by the bank to the creditor marked 'R. D.' The creditor is annoyed, and makes no secret of the matter. Of course the bank has to credit A's account with the amount of B's cheque, but his (A's) credit is seriously damaged, and he suffers substantial pecuniary loss.

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[1] *Op cit.*, p. 21.

[2] It is generally admitted that the English Law of Negligence (as a purely tortious liability) is a very modern branch of the law, which may well have been developed on more scientific lines than the older law affecting positive wrongs. But it can hardly be argued that acts are less likely than omissions to have found their way into the Law of Torts.

Does an action by A lie against B for the forgery; and, if so, what kind of an action? [1]

Case 3. Take now a case in which no violation of the criminal law is concerned. A is the niece of a wealthy bachelor, X, who has declared his intention of leaving the bulk of his property to her. B, who dislikes A, informs X that A is secretly engaged to marry a man to whom, as B well knows, A has the strongest possible objection. B does this in the hope that X will be influenced by the information to deprive A of the benefits intended for her. There is no truth in B's allegation, as B well knows; but X believes it and revokes his will, leaving his property to strangers.

Has A an action of Tort against B, or, again, is this one of the 'necessary exceptions'?

Such cases could be multiplied to any extent; but it is needless to labour them. The truth appears to be an illustration of Maitland's epigram: "The forms of action we have buried; but they rule us from their graves." Fortunately for the Law of Contract, the form of action adopted was such as to leave scope for its application to all kinds of contract; and thus what may be called the casuistical doctrine of contract was superseded by a truly scientific conception. This good fortune English law apparently owes to the unknown benefactor who invented the test of valuable consideration. Unhappily, no such flexible and common-sense test has yet been invented for 'civil wrongs other than breaches of contract.' Some, by a rather painful and chancey process of analogy, have been smuggled in as 'quasi-contracts'; and one of the best parts of Professor Winfield's book is that which deals with this topic.[2] But it is almost as difficult to find a satisfactory definition of Quasi-Contract as of Tort; and as Professor Winfield conclusively shows, for the same reason, viz.: that the recognition of quasi-contracts has proceeded along procedural rather than substantive lines.[3] But the significance of Quasi-Contract for the present purpose appears to be that, if it is admitted, the validity of the old dichotomy—Contract and Tort—at once disappears.[4]

It is, of course, well known that both the French and the German Civil Codes boldly state, as a matter of law, the ideal towards which Sir Frederick Pollock and Professor Winfield appear to lean. The older of

[1] In an informal plebiscite held by the writer through the courtesy of *The Times* in August last, it was almost unanimously voted that no action lay.

[2] Chapter VII, pp. 116–89.

[3] On the other hand, the mysterious requirement of 'privity' in certain cases of quasi-contract looks as though the eighteenth-century judges were thinking more of substance than of form.

[4] It is not without significance that such a modern work as Halsbury's *Laws of England* has no separate title for Quasi-Contract. The obligations dealt with by Professor Winfield under that rubric are in Halsbury classed as 'constructive contracts' (vol. vii, p. 463).

these Codes, the *Code Napoléon*, states that "every act (*fait*) of anyone which causes loss to another binds him by whose fault (*faute*) the loss happens to make it good." The definition is interesting; for it clearly postulates 'fault' as an element in delict; though it would be hard for anyone but an authority on French philology to be sure whether *fait*, at the beginning of the nineteenth century, included omissions as well as acts.

The German *Bürgerliches Gesetzbuch*, a century younger than the *Code Napoléon*, is less logical and compact in appearance in dealing with the subject; but it does, apparently, attempt, in Art. 823, an exhaustive definition of a delict, though the existence of the three succeeding Articles is evidence that its framers were doubtful whether they had succeeded.[1] But it is noteworthy that the definition in Art. 823 postulates as elements of a delict (1) contravention of the law, (2) intention or negligence, though it does not apparently specify whether the intention must be (*a*) to inflict harm or merely (*b*) to do the act complained of. Perhaps Art. 826 is nearer to Sir Frederick Pollock's ideal than Art. 823; for it imposes compensatory liability upon anyone who intentionally causes harm to another *gegen die guten Sitten*, which, as Professor Winfield happily suggests, may be described as 'unsocial conduct.' It will be noted, however, that, while the German Code here deals only with damage intentionally inflicted, the English Law of Torts has, in many of its rubrics, no such requirement.[2]

But the outstanding difference between the application, as distinct from the formulation, of the English law and the foreign Codes is, of course, that, despite the very recent growth of *arrêtisme* in both France and Germany, there is, in those countries, no such doctrine of judicial precedent as binds the English courts. Consequently, while a German or a French judge is at liberty to interpret his code more or less in accordance with his view of the equity of the case, an English judge finds himself bound at every turn by the decisions of his predecessors, and, even where the road is clear, by the haunting fear lest he, in his turn, should bind upon his successors a burden not easy to be borne. There is, therefore, no real parallel between the rules in the French and German Codes and the principles of Sir Frederick Pollock and Professor Winfield.

It does, indeed, appear to be possible to achieve a dichotomy of civil wrongs which would be logical. As Professor Winfield points out,[3] a tort is a breach of a "duty primarily fixed by law," as opposed to a duty primarily fixed by agreement of the parties; and civil wrongs may be plausibly divided into those arising from breaches of duties *in rem* and those arising from duties *in personam*. But, even to this classification there are two objections: (1) that, to make it work, one would have to exclude from the list of civil wrongs breaches of trust and similar breaches of duties *in personam,* on the ground that they are only enforceable in equity, and, more serious, (2) that quasi-contractual obligations would fall into the former class, because they are clearly breaches of duties " primarily imposed by law." The result would be, that remedies in Quasi-Contract would not be assignable and would disappear on the death of either party before judgment, unless they could be brought within the statutory exceptions or the rule in *Phillips* v. *Howfray,*[1] or unless a further subdivision of breaches of general duties were accepted.

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[1] The three succeeding articles deal with specific torts (*e.g.* seduction and defamation).

[2] *E.g.* in defamation and unconscious infringement of monopoly rights.

[3] *Op. cit.*, p. 32. This appears also to be the view of Sir Frederick Pollock (*Torts*, p. 2).

Even, however, if this classification could be made to square with juristic and professional requirements, it is obvious that it would be of little use to the layman. The layman is not concerned, as has before been suggested, either with procedural or with juristic definitions. He desires to have definitions of substance, which will guide him in his conduct. It may be that, in the matter of delicts, we can but refer him to the list in standard works such as that of Sir Frederick Pollock, with the warning that English judges may, from time to time, add to the list if, in the exercise of their trained discretion, they consider that the analogy of previous decisions justifies them in so doing. Whether they may also take into account the general advantage to the community of doing so, is more doubtful. And the layman should also be warned, that if these law-founding judges do not happen to be at the time sitting in the highest tribunal, their innovation may subsequently be disclaimed by such a tribunal.[2] This may be cold comfort ; but it is better than rash optimism.

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[1] (1883) 24 Ch. D. 439. See on this case Pollock, *op. cit.,* at p. 74.

[2] *E.g.* the well-known instance of *Heaven* v. *Pender* (1883), 11 Q.B.D., pp. 507–10, opinion of Brett, M.R. It would appear that Sir Frederick Pollock himself (*op. cit.,* p. 452) doubts the soundness of the view expressed by the M.R.

BERMUDA LAWS AND FRANCHISE.

[*Contributed by* T. M. Dill, Esq., O.B.E., *Barrister, Attorney-General of Bermuda, and* L. Le M. Minty, Esq., Ph.D., LL.B., *Barrister-at-Law.*]

It is a constitutional maxim that when English colonists settle in a country, willy nilly, they bring with them the common law of England, and so much of the statute law in force at the time of their first effective settlement as will be applicable to them in their new conditions. Subsequent statutes passed by the Parliament at Westminster do not apply to the new colony unless distinctly made applicable by their provisions or by natural inference. Thus the Statute of Frauds, 1678, being subsequent to its settlement, has never been in force in Bermuda, and though its legislature has passed subsequent laws closely modelled on English statutes, much of its law remains uncodified. It has, for example, no Sale of Goods Act and no Bills of Exchange Act.

Until 1905 the old form of common law procedure by special forms of action obtained as in England before the Common Law Procedure Act, 1854.

The Bar.—This apparent failure to keep abreast of legal changes in England, it may be pointed out, was not the consequence of dunderheadedness on the part of its former Attorneys-General, who as the mouthpiece of the House of Assembly are responsible for introducing measures of law reform. Bermuda has a local bar qualification which consists in being born or having lived previously two years in Bermuda and reading as a pupil in chambers with a local barrister for three years. Procedure under the old system of actions of assumpsit and actions on the case became, as years rolled on, a kind of black art known only to members of the Bermuda bar, so that after the bar was opened to those who had been called by an Inn of Court in England, if they came to Bermuda, they were not likely to succeed unless they went into a local attorney's office and learnt the old forms of technical pleading, the retention of which was the only way in which the local bar could prevent itself being swamped with practitioners from other parts. It is still a rule that no practitioner can practise unless he has been resident in Bermuda three years. This means that a practitioner coming new to Bermuda must have sufficient means to support himself for three years, and the bulk of the work is kept by a few old-established firms of attorneys.[1]

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[1] There is fusion in the colony, an attorney doing the work of both barrister and solicitor. Many come to England to be called to the English bar.

Exception to English Law.—Another proof of the foresight of Bermudians lies in their refusal to adopt a Companies Act. A company can be formed in Bermuda only by private Act, which may be granted or refused by the Legislature, and the Act may afterwards be disallowed by the Colonial Office. A trading company is not exempted from the Mortmain Acts, and cannot without special Act of the Bermuda Legislature own land. Here again the intention is farseeing, to keep out speculators forming realty companies to buy land. Within recent years the principal industry in Bermuda has been the tourist and hotel trade. They are naturally determined to keep such a profitable industry to themselves, and not allow speculators from Florida to flock in and buy them out. For the same underlying motives no foreigner, unless naturalized under the Imperial Nationality and Status of Aliens Act, 1914, may own land in Bermuda, and if a foreigner marries a Bermudian woman owning land, she must sell it by reason of acquiring his nationality.

A great deal of casual labour is employed on the docks and in shipping. These are the only occupations in Bermuda where serious accidents are likely to occur. Consequently, there has never been any strong demand for an Employers' Liability Act, or a Workmen's Compensation Act. The doctrine of common employment may be utilized by Bermudian employers to escape liability for the negligence of their foremen, though there are no recent instances of such a defence. Lord Campbell's Fatal Accidents Act which was passed in England in 1846 was not copied in Bermuda until 1868, but there is little use for the Act, as employers always make voluntary provision for the dependents of a man killed by negligence, and again, no case has arisen under the Act. No trade union Act has ever been passed, and a trade union of masters or men is a common law conspiracy.

Bermuda, although it caters for American millionaires, takes care that they shall bring nothing but money into the Island. No motor-cars are allowed other than lorries for road making, and tourists as a consequence are obliged to patronize the local hackney-carriage drivers. A petrol-driven tramway has been laid down along the length of the Island, but, up till now, the American plutocrat has had to take himself to the luxurious golf links in a hired horse and trap.

These conservative tendencies are worth studying in detail, because they show that wherever there appear big gaps in legislation thought necessary over here, the reasons why they have not been filled in by the Bermudian legislature is that they know which side their bread is buttered and have, without giving reasons which might give offence to those by whom they live, decided to leave well alone. They cannot be blamed for their attitude. The well-to-do families in Bermuda have been traders settled there for centuries. Without the assistance of heraldry they can trace their forefathers back to Somers' shipwreck and know the villages in the West of England, from whence they came before that. During the American War of Independence Bermuda remained loyal to the Motherland. Their prosperity has been built up as the result of generations of hardy seafaring without assistance from the English Treasury. They are determined to keep their prosperity to themselves, and are not inclined to surrender the machinery of legislation to a larger electorate who would make it possible for large numbers of undesirable and underpaid immigrants to settle there and reap where their forefathers previously sowed.

Taxation.—From the early days of the settlement until the latter half of the last century the bulk of trade came directly or indirectly from shipping and shipbuilding. The cedar trees with which the Island is covered made good timbers, and it was not until after the American Civil War, 1862–5, that steam drove her sailing ships from the Atlantic. From the Declaration of Independence until long after the American Civil War, Bermuda was England's most important Atlantic naval station. A repairing dockyard and a strong garrison were maintained on Ireland Island, and the money spent by the Imperial Government in building fortifications by local contracts and paying troops went ultimately into the pockets of the Bermudian shopkeepers. In 1869 a huge dry dock was built in England, towed across the Atlantic and secured at St. George. Tobacco, which received a bounty from the Somers Island Company, was the earliest crop, but during the last half of the nineteenth century when a rapidly increasing population in the Eastern part of the United States created a market, the cultivation of early vegetables gave employment to the negro population, until competing producers in the Southern States, aided by a high protective tariff, put a virtual end to the industry. The present tourist and hotel trade is about fifty years old. Bermuda has now become a haven of rest and enjoyment for American millionaires whose expensive tastes are hampered by prohibition in their own country. In an island where the bulk of commodities come from overseas, the simplest method of raising taxation is by an *ad valorem* duty upon imports which requires no expensive machinery to collect. Bermuda has consequently set herself against an income-tax and any form of direct taxation, and nearly all her revenue (about £250,000) is derived from customs. Whereas a duty upon articles of consumption is ordinarily a retrogressive duty inflicting an undue burden upon the working-class consumer, the incidence of the Bermuda customs duties falls largely upon the tourist and well-to-do residents. The duties force up the standard of living, but the worker is not unduly penalized, because his wages rise more in proportion, and the articles of consumption affected by the indirect taxation are articles of luxury, not normally included in his family budget.

Soon after the Settlement of Bermuda, negro slaves were brought to the Island, but in most cases they had been bred in the West Indies; few of them came direct from Africa. The proportion of negroes to whites has never been more than two-thirds, and, as the Island has always been thickly populated, the negroes have been in close association with better-class whites for about three centuries.

Slavery.—Slavery continued until 1834, but in its later years it amounted to little more than an inability of a slave to make a free contract of service. Though he could not leave his master's employment voluntarily, neither could his master turn him adrift when he got too old to work, and in practice a master had to submit to a system of old-age pensions for his slaves after they got past sixty. The result has been to breed a much better type of negro than is found in the West Indies, and the Bermudian negro, when he finds himself in company with negroes from Jamaica—as for example happened during the War when a Bermuda battery (the first force of British coloured troops to be employed in France) under officers recruited from the Bermuda Militia Artillery later came into contact with the battalions of British West African infantry—he regards himself as much superior, and does not willingly associate with them.

Constitution.—The administration of the Island by the Somers Island Company came to an end in 1684, when the Company's charter was revoked, and a Governor was sent out from England. Bermuda developed a constitution similar to those of other colonies settled or ceded during the seventeenth and eighteenth centuries. It had a Governor and Council with executive and legislative functions, appointed by the Crown, and a House of Assembly elected by the free colonists generally on a franchise limited to freeholders. The Bahamas, Barbados and Bermuda are the only survivors of these original colonial constitutions. Others have either been granted responsible government, or, as a result of social or economic disasters, have had their representative institutions curtailed or abolished.

The present Governor is appointed from England and resides at Hamilton, to which Sir James Cockburn removed the capital from St. George. The Courts of Justice are also at Hamilton. The Governor is assisted by an Executive Council of six nominated by the Crown and a Legislative Council of nine similarly nominated. There is also a Legislative Assembly of thirty-six, elected four from each of the nine parishes into which the islands are divided.

Franchise.—Immediately prior to the emancipation of the slaves, the real property qualification for the electoral franchise was £40 assessed value, but the same measure which freed the slaves raised this qualification to £60. This was done to guard against the too sudden acquisition of political privileges by the newly freed coloured folk, and has never since been altered. As the bulk of the industry of the Island was at that time shipping and fishing and not agriculture, the economic life of the Island was not much affected by the emancipation. Bermuda is probably the only place in the world where black and white citizens have been brought into close contact without need for "colour bar" regulations.

Although the coloured folk of Bermuda are a healthy community with moral standards as high as most white races, the proportion of blacks to whites until quite recently was tending to diminish. This was due to the emigration of the negro male population to the U.S.A., and an increasing immigration of Portuguese. In the decade 1920–30 immigration of blacks to the U.S.A. as a result of Federal legislation has almost ceased. The proportion of coloured to white population under the 1931 census has therefore somewhat increased. The total population of Bermuda is about 28,000, of whom about 18,000 are coloured.[1]

The first coloured member was elected to the House of Assembly fifty years ago, and at the present time there are four coloured members. The probability is that the future will see a gradual increase in the coloured membership, even if the franchise remains unaltered and restricted to whites.

The main reason why the colony has adhered to its £60 white male freehold franchise qualification since 1834 has been the fixed determination of the Bermudians that the government of the Island shall remain within the control of those who are permanently settled there. Although women have no vote, there was until 1923 no insistent demand for votes for women, because freeholders have regarded themselves as merely registering a vote on behalf of their families, who occupy the £60 of freehold, and the representatives elected in such a miniature colony are personally known to all voters and are chosen as much by wives as husbands. A Bermuda Women's Suffrage Society, formed in 1923, sent in 1930 a memorial to the Secretary of State for the Colonies advocating political sex equality. The leaders of this Society are for the most part women intellectually, no doubt, quite fitted to register votes intelligently. Within the Island they have been, and still are, in a hopeless minority. Like the pre-War suffragettes in England they have tried to obtain what they want by refusing to pay taxes and protesting in similar ways. The majority of the present electorate in Bermuda is definitely opposed to women's suffrage. Bermuda is at present governed by a House of Assembly the representatives to which are elected by residents guaranteed to have an interest in the economic welfare of the colony to the extent at any rate of holding £60 in land assessable to taxation at that value. The extension of the franchise would mean that in course of time nominees of real property companies would get elected, and by passing laws of which the Legislature has hitherto carefully avoided the consideration, make it possible for the Island to be bought, lock, stock, and barrel, by real property speculators. If the enfranchisement were extended only to white women, it would create immediately a sense of irritation and injustice among the coloured population, who, more than white folk, are keen on maintaining man's political supremacy. If it went to the limit of universal adult suffrage, including the coloured population as well as white, the present Bermudian official view is that either:

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[1] It is exceedingly difficult to enumerate the permanent population satisfactorily, as, besides the troops belonging to the garrison who may be moved at any time, some 90,000 tourist visitors come and go in the course of the year.

(*a*) The white population, though in a minority, would be kept in power by force or fraud such as exists in the Southern States of America, and to some extent in South Africa; or

(*b*) The change would mean in course of time the practical abandonment of the Island by the white race, either as a result of extermination or fear of extermination by the coloured, or of economic conditions as in Hayti, San Domingo, and some of the British Islands of the West Indies, where political power having got into the hands of the black population, hopeless financial mismanagement has followed.

Having failed to make any headway by petitioning members of the Legislative Council of Bermuda and having failed to get active support from any considerable number of women voters in the Island, the leaders of the Bermuda Women's Suffrage Society came to London in the spring of 1931, and as a consequence of their representations, the then Colonial Secretary, Lord Passfield, in April 1931 wrote to the Governor, expressing surprise at the out-of-date franchise conditions which have in fact remained unaltered for nearly a century. He recognized that the last word must rest with the Bermuda Legislature, but recommended a general extension of the franchise.

His letter was read in May 1931 in the Bermudian House of Assembly and listened to with respect, but silence. Constitutionally it is not within the powers of the Colonial Secretary, in spite of the democratic principles to which he is pledged, to interfere with the franchise qualifications of a colony having responsible government. He may give the women delegates of the Bermuda Women's Franchise Association his blessing, but nothing more. He has no power to appoint a commission of inquiry into the Bermuda franchise, unless the Bermuda Legislature agree to pay the cost, which they refuse to do. Whatever private views a Colonial Secretary may hold, he must recognize—as did Lord Passfield—that the Bermuda franchise is something exclusively within the purview of the Bermudian legislature.

MOSLEM LAW IN THE MIXED COURTS OF EGYPT.

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As is well known, the law applied by the Egyptian Mixed Courts is primarily that contained in the Mixed Codes promulgated at the time of their foundation. This law is French in principle and in form. It is true that certain local institutions, Ottoman rather than Moslem in character, find some place in the Codes. But this does not affect the truth of the general statement that Mixed Law is French law.

The concurrent existence in the country of Moslem courts charged with the duty of administering the Moslem Personal Law and the Law of Wakf appears at first sight to exclude questions of Moslem law from the Mixed Courts. Art. 4 Mixed Civil Code states that if questions relating to matters included in the Personal Statute arise incidentally in a Mixed Suit the Mixed Court must adjourn (*devront surseoir*) judgment on the principal issue and fix a period within which a decision of the competent Court of Personal Statute shall be obtained upon the incidental question.

Nevertheless, of recent years in particular, there has been a marked tendency to interpret this article, not as compelling an adjournment whenever a question of the Personal Statute arises in a Mixed Suit, but only as directing an adjournment when the material before the Mixed Court does not enable it to decide the question of personal statute for itself. Many decisions upon these lines may be cited.[1] As a result of this tendency we find numerous illuminating decisions upon questions of Moslem Personal Law in the Mixed Courts Reports. The scope of these is, of course, limited, since the Mixed Courts have no jurisdiction as between "natives," *i.e.* Egyptians or ex-Ottomans.[2] They have reference mainly to the powers and duties of heirs of a Moslem Succession, of guardians of Moslem infants, and of gifts made by Moslems in the last illness.

Another and even more important subject which calls for the direct application of Moslem law by the Mixed Courts is Wakf. Wakf, it has long since been definitely decided, does not belong to the Personal Statute. No question of adjournment therefore arises. When a question as to the law of Wakf arises in a suit otherwise within the Mixed Jurisdiction, it falls to be decided by the Mixed Courts. And it would appear that the only restriction upon Mixed Jurisdiction in Wakf is that contained in

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[1] *Cf. Gaz. Trib. Mixtes*, xv, no. 16, and judgments there cited.

[2] Khayyat and Sursock. *Gaz. Trib. Mixtes*, xxi, no. 85.

Art. 12 of the Statute of Organization of Mixed Suits and Art. 8 of the Mixed Civil Code, which deny to the Mixed Courts jurisdiction over revindications of immoveables on the part of foreigners against "*un établissement pieux.*"

These provisions have been the subject of much discussion, but their true import appears clear after consideration of their origin. There seems no doubt that they were merely intended to exclude petitory actions against a Wakf from the jurisdiction of the new courts: "Si le possesseur légitime était l'Européen, la décision sur la question de propriété serait de la compétence du nouveau Tribunal": (*i.e.* the Mixed Court) "Si ce possesseur légitime était le Ministère des Wakfs, c'était devant le Tribunal du Mehkémé (*i.e.* the Moslem Court) que l'Européen devait faire valoir ses titres à la propriété de ce même immeuble contre le Ministère des Wakfs." [1]

With this restriction, therefore, any question relating to Wakf may be brought before the Mixed Courts, provided, of course, that the fundamental conditions of their jurisdiction as to the nationality of the litigants exist.

It is not my purpose here to do more than make a selection from the recent Reports of some of the more striking cases in which questions of Moslem law have been raised. And in the present essay I propose to confine my attention to cases which concern the Moslem Law of Inheritance.

Succession.—Questions as to rights of inheritance are not, perhaps cannot be, decided by the Mixed Courts. Indeed, in Egypt the rule of the Dar el Ikhtilaf (difference of nationality) which excludes any save local subjects (or *semble* ex-Ottomans) from a share in an Egyptian Moslem succession still prevails.[2] The Mixed Courts have indeed inclined to interpret this rule broadly by admitting to a share in such a succession subjects of States in peaceable relation with Egypt,[3] but the Moslem Courts do not appear to approve this interpretation.[4]

However this may be, cases in which the question is as to the rights of claimants to rank as heirs to a deceased Moslem are not to be found in the Mixed Courts Reports. The distribution of an inheritance among the heirs in accordance with the Personal Statute does not fall within the jurisdiction of the Mixed Courts though, indeed, such distribution was undertaken by them in a recent case which appears to be of doubtful authority. It concerned the estate of a deceased Russian. The legal difficulties to which the position of Russian subjects in Egypt gives rise have already been mentioned in this Journal.[5] It is sufficient to say that in the case in question an able but somewhat self-willed judge held that the Mixed Courts themselves were competent to distribute the estate of the Russian *de cujus*, applying the Tsarist law, contradicting formally the view generally held that the Moslem Courts are the Common Law Courts of Personal Statute, and have consequently jurisdiction to distribute the inheritance of any person save where capitulatory rights or membership of a native religious community gives jurisdiction to a Tribunal of Exception, that is, to a Consular, Patriarchal or Rabbinical Court.[1]

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[1] Cited from *procès-verbal*, December 28, 1869, giving the explanation of the matter communicated to Nubar Pasha. See *Gaz. Trib. Mixtes*, xv, p. 17.

[2] The restriction has been abolished in Palestine (Succession Ordinance, 1923, s. 2) and in Syria (Arrêté, 1833, February 6, 1930).

[3] Barsa and Heirs of Barsa. *Gaz. Trib. Mixtes*, xix, no. 4. *Cf.* xviii, no. 7.

[4] Sec. Melkonian and Melkonian, before the Moslem Court of Appeal. *Gaz. Trib. Mixtes*, xiv, p. 71.

[5] *Journal of Comparative Legislation*, Third Series, vol. xi, pt. iv, pp. 280 ff.

The questions of Moslem law relative to inheritance which come before the Mixed Courts relate almost exclusively to the rights of creditors, and to the validity of gifts, particularly those made during last illness. It is under the first of these heads that most of the cases must be ranged. The Moslem doctrines applied by the courts on this matter form a consistent body of law.

Rights of Creditors.—To understand the bearing of the cases, it will be well first to give a summary of the doctrine as understood in Egypt. For this purpose I refer to an able exposition of the matter contributed to *L'Egypte Contemporaine* in 1914 by a brilliant Egyptian lawyer Abd el Hamid Pasha Badawi. The Mixed Court decisions are in the main in conformity with the views there expounded, though the writer finds occasion to criticize with some severity certain decisions of the Native Courts which he points out are inconsistent with Moslem principles, and to suggest an inability on the part of the judges to escape the influence of French legal conceptions.

The gist of the thesis expounded by Badawi Pasha is that obligations are in principle not transmissible under the Moslem law ; they are strictly personal and available only between the original debtor and creditor. A cursory knowledge of Moslem law will suggest numerous applications of this principle. Thus, assignment of debts or credits is not allowed, save with the consent of the debtor or creditor, that is, by way of novation. So also, a lease terminates upon the death of either party. From the personal character of an obligation it follows that the remedy of a creditor is against the property of his deceased debtor only. He has no remedy against the heir, except as detainer of the property of the *de cujus*. The fiction used is that the *de cujus* survives in his inheritance. But for the fact that the theory of artificial personality is unknown in Moslem law, one might have said that the succession is a juridical person to which is to be attributed the rights and obligations of the deceased. Consequent upon this it follows that there is no inheritance until debts have been paid. "Le *de cujus* est seul propriétaire de la succession, des fruits et produits des biens successoraux. En ce qui concerne les créances et les dettes héréditaires, il est le seul créancier ou débiteur. Le rôle de l'héritier se borne à le représenter, et c'est obligatoire. C'est pourquoi les héritiers ne peuvent procéder ni à un partage, ni à une transaction, les deux actes étaient des prérogatives du propriétaire. Ils ne peuvent non plus vendre les biens de la succession sans l'autorisation des créanciers."

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[1] Gregorian and Gregorian. *Gaz. Trib. Mixtes*, xxi, no. 128.

Distinctions between Insolvent and Solvent Estates.—A distinction, however, needs to be drawn between the case of an insolvent and that of a solvent estate. In the former case there is no surplus to inherit. In the latter, however, there is a surplus of which the heirs must be deemed proprietors. Strictly speaking, of course, they could only be deemed proprietors of a balance to be determined after payment of debts. But this logical conclusion would be difficult in practice unless, as under English law, an executor or administrator was put in charge of the liquidation. Testamentary executors are not unknown in Moslem practice, though usually, if not exclusively, to be found only if the heirs are minors. The resemblance of Moslem law in principle to the English system is indeed very great, but the absence normally of a liquidator makes it necessary to leave the actual administration to the heirs. If the estate is solvent it would seem extreme to refuse them the rights of proprietor where no prejudice can result therefrom to the creditors. Moslem law recognizes therefore that the heirs do become proprietors if the estate is solvent, but that the whole estate is subject to what, using French terminology, we may call a " legal hypothec " in favour of the creditors. This quasi hypothecary right may be pursued by each creditor against each heir for a share of the debt proportional to his share in the inheritance, or against any heir for the whole. A right of contribution is in the latter case admitted. Finally, property forming assets of the succession can be followed into the hands of third parties if the assets in the hand of the heirs do not suffice.

Such, in outline, are the principles of Moslem law (Hanafite Rite) as expounded by Badawi Pasha. In all questions of Moslem law the Mixed Courts necessarily refer primarily to the Code of Moslem Personal Law drawn up by Kadry Pasha which is, for Egypt, the authoritative compilation. References to the provisions of this Code are frequent in Mixed Court judgments, though occasional references to other authorities occur. But in the interpretation of the provisions of the Code the influence of the article of Badawi Pasha may be not faintly discerned and is sometimes explicit.

Judgments.—It should also be borne in mind that the judgments of the Mixed Courts invariably follow French models in point of form. This model has some disadvantages ; in particular we miss the clear preliminary statement of facts which English tradition requires. On the other hand we are spared the repetitions of facts and law which are far too common in the lengthy judgments reported from our own courts, and the consequent uncertainty which sometimes results as to the ground upon which a decision really rests. (After all, judgments are not given for the entertainment of students of law, yet no other obvious purpose seems to be served by the interesting, but strictly superfluous, presentations of the facts and law indulged in, with all respect be it said, by some of our eminent judges of the Court of Appeal and of the House of Lords.)

This much premised, I proceed to give a selection from recent Mixed Court decisions which illustrate the application of Moslem doctrine in matters of succession.

General Principles Governing Administration.—The general principles governing the administration of a Moslem succession were elaborately stated in a case before the Civil Tribunal of Alexandria, April 20, 1926 (Greffier en Chef du Tribunal d'Alexandrie & Mortgage Co. of Egypt; *Gaz. Trib. Mixtes*, xvii., no. 217). The liquidators of a Moslem succession had created a hypothec over property included in the succession for the benefit of certain creditors thereof. Its validity was denied by other creditors. The Tribunal held the hypothec to be void as against other creditors, including the Mortgage Company of Egypt.[1] It took the opportunity to lay down the general law relating to administration of Moslem successions, citing numerous cases in support of its propositions:

1. The "succession"[2] must pay general expenses and debts. Heirs do not acquire rights to their shares till debts have been paid.

2. The principle "le mort saisit le vif" is not a principle of Moslem law. A Moslem succession forms a mass separate from the private estates of the heirs.

3. Consequently, though the heirs have a right to inherit arising from the death of the *de cujus* they cannot exercise their rights until all the debts have been paid. Until this has been done they have therefore no power to dispose of the goods included in the succession, which are regarded as subject to a legal hypothec for the benefit of all the creditors. Dispositions contrary to this rule are, therefore, void.

The proposition that there is no inheritance until debts have been paid is illustrated by the case of Giannopoulo and Saba Habib before the Mixed Court of Appeal, April 10, 1930 (*Gaz. Trib. Mixtes*, xxi, no. 144). Saba and his wife had bought immoveable property from the heirs of the *de cujus*. They had made no inquiries as to whether debts existed or had been paid. The purchase was held null as against the creditor, Giannopoulo. "La jurisprudence mixte," says the judgment, "a retenu que les héritiers musulmans bien que nantis théoriquement d'un droit d'heritage qui prend sa naissance dès le déces du *de cujus*, ne peuvent cependant disposer des biens de la succession avant l'acquittement de toutes les dettes du défunt." In this case the evidence did not show whether the estate was, or was not, solvent.

With this case may be compared that of El Rayess and Chilbaya, Court of Appeal, February 8, 1926 (*Gaz. Trib. Mixtes*, xviii, no. 44).

El Rayess had purchased an immoveable from the heirs of

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[1] Compare also Nicholaides and Land Bank. *Gaz. Trib.*, xix, no. 47.

[2] The "succession" is frequently spoken of as if it were a juristic person. Such language is French, not Moslem.

El Gayar. Action was brought against him by a creditor of the succession. The Court laid down the law as follows:

> Attesochè sia equo di ammettere che l'acquirente di un bene ereditario possa arrestare l'azione di un creditore della successione quando siano in questa beni e fondi sufficienti a disinteressarolo : ma la stessa equità esigeche egli intanto possa avvalersi della stessa eccezione in quanto sia in grado di indicare con tutta precisione i beni ereditari sui quali il creditore procedente possa pagarsi e dimostrare che i detti beni siano sufficienti a un pagamento integrale.

These conditions not having been fulfilled by El Rayess, he would have been deemed unable to hold the property against the creditor, but for the fact that the creditors had without sufficient cause stood by and allowed a complete merger of the property derived from the succession with the private property of the heirs long since to take place, and that their laches now prevented them complaining of dispositions of the property made by the heirs.

Confusion of Assets with Private Property.—Several decisions turn upon the attitude taken by the Court with reference to the conduct of the heirs who confound the assets of the succession with their private property, or that of the creditors of the succession who stand by and delay action when such a " confusion " has been effected.

Thus in the case of Veuve Abaza Bey and Sivadi before the Court of Appeal, January 16, 1930 (*Gaz. Trib. Mixtes*, xxi, no. 145), heirs of an estate, certainly insolvent, had disposed of certain moveables, including a motor-car, which formed part of the assets. Judgment having been obtained by a creditor of the estate against an heir, the latter argued on appeal that he could not be condemned for more than the creditor would have received on a *pari passu* distribution of the assets. The Court decided that where the heirs of an insolvent succession failed to take measures by way of inventory or otherwise to separate the assets of the estate from their private property, but merely took over the assets and merged them with their own property, they rendered themselves liable personally for the whole of the debts, and each for the whole. Reference with approval was made in the judgment to the Article by Badawi Pasha above quoted, and comparison may be made with the similar case of Abdul Rehim Pasha Fahmy and Arcache before the Court of Appeal, November 27, 1930 (*Gaz. Trib. Mixtes*, xxi, no. 146). In that case also the heirs had made no inventory and the estate was probably insolvent. The Court held that the creditors could follow the assets of the succession and exercise their " real " right (*une sorte de jus in re analogue au gage*) against assets for the whole of the debt. If an heir paid the whole he had a right of contribution against his co-heirs.

If, however, the conduct of the heirs has not produced a merger of the assets of the succession with the private property of the heir, the heir is liable only up to the amount of his share. This rule was applied in Ibrahim Pasha Hilmy and Berlein before the Court of Appeal, March 31, 1924 (*Gaz. Trib. Mixtes*, xv, no. 54). Judgment had been given against Hilmy Pasha, as heir of his son, the late Prince Mohammed Hilmy, for the sum of £E.500 claimed on a bill signed by the deceased. On appeal the Court sustained the judgment. The case was not one in which there had been merger of the succession with the private estate of the heir such as might give rise to a personal liability on the part of the heir. But the Court laid down that, in principle, the heir could be adjudged liable to pay a creditor of the succession up to the amount of his share of the succession. Execution would only issue against the share, and it was for the execution creditor to show what the amount of the share was. Compare *Gaz. Trib. Mixtes*, xii, no. 25.

No Inheritance until Debts have been Paid.—In spite of the rule, time and again enunciated by the Mixed Courts, that there is no inheritance in Moslem law until debts have been paid, yet, in strict accordance with the law as laid down by Badawi Pasha, it has frequently been held that if an estate is admittedly solvent the heirs have not merely an inchoate right, but a title to their shares from the date of the death. In Sheikh Hegazi and Papadakis before the Civil Tribunal of Mansourah, May 15, 1924 (*Gaz. Trib. Mixtes*, xv, no. 55), of which the facts are not reported, the rights of private creditors of an heir against his share in the inheritance were in issue. These rights were held inviolate in the case of a solvent succession. The Tribunal laid down that it is only when the heir refuses to pay the debts of the succession that he can claim no right over the assets of the succession until payment of the debts. If the assets suffice for payment of debts the share of the heir devolves on him, and is available for his private creditors.

A more interesting case which illustrates the same point is that of Bakhoun and Haddad before the Civil Tribunal of Cairo, December 20, 1920 (*Gaz. Trib. Mixtes*, xi, no. 97). Haddad in 1920 had bought land adjoining property forming part of the succession of the late Theodore Bakhoum, who had died in 1915. Hanna Bey Bakhoum was appointed liquidator of the succession which was heavily encumbered. The liquidation had been completed and a partition of the surplus assets was arranged, the land adjoining the property purchased by Haddad being allotted to Bakhoum Bey. The latter now purported to exercise his right of pre-emption.

It is an admitted principle of Mixed Law that partition is declarative and not constitutive of property rights. The defendant, however, contended that since, according to Moslem law, there is no inheritance until the debts are paid, Bakhoum Bey had, at the time of the sale to Haddad, no title to the adjoining land in respect of which the right of pre-emption could be exercised. The Court in deciding in favour of the pre-emptor used language which follows closely that of Badawi Pasha in the article above summarized—though the article itself is not cited:

(Attendu en droit musulman que l'intransmissibilité des obligations par déces, admise purement et simplement, parait équivalente à leur extinction ;

elle serait dangereux par le crédit et nuisible aux intérêts du décujus. La justice et les principes veulent qu'il ait un titulaire des droits successoraux (le droit musulman ne connaissant pas la *res nullius*) la règle à été donc tempérée par la fiction de la survivance du défunt dans la succession pour arriver au but de la législation à savoir la liquidation de la succession et l'acquittement des charges héréditaires; c'est par rapport aux créanciers des successions que les docteurs musulmans font une distinction suivant que la succession est solvable ou non, ils comparent une succession insolvable à la masse des biens d'un failli, il y a dessaisissement en faveur des créanciers et disent que dans une succession solvable l'héritier ne devrait être considéré comme propriétaire que de l'excédent de l'actif en appliquant la fiction, mais cette application a paru excessive aux docteurs musulmans. Aussi ne la soutiennent ils pas et déclarent qu'il serait plus avantageux de considérer l'héritier comme propriétaire de tout l'actif héréditaire, auquel cas les droits des créanciers ne seraient pas pour cela sacrifiés, car le droit de propriété de l'hérédité est grevé de leurs droits sur l'hérédité toute entière.

Attendu qu'en un mot il résulte que sur la nature du droit de l'hérédité on a décidé que dans une succession insolvable l'héritier est simple représentant, mais dans une succession solvable il est successeur particulier. Qu'on doit conclure que la transmission de la propriété de l'actif héréditaire a ou n'a pas lieu suivant que la succession est ou non solvable, mais qu'il y a lieu de faire remarquer au premier défendeur que la propriété et la responsabilité personelle des dettes sont des questions différentes. Que le premier défendeur n'a nullement contesté la solvabilité de la dite succession, que du reste la dite question ne concerne que les créanciers et les héritiers ;

Qu'il y a donc lieu de recevoir l'action du demandeur à titre d'héritier ;)

Powers for Testamentary Executor.—The case of *Khalil* v. *Bahari* before the Court of Appeal April 27, 1926 (*Gaz. Trib. Mixtes*, xviii, no. 46), illustrates many rules and introduces us to a Moslem testamentary executor. This decision in the case in the court below is also reported (*Gaz. Trib. Mixtes*, xii, no. 25) *sub nomine Bahari* v. *Chedid*, and the judgment in this court is of very great interest. The facts were very complicated and, in the interval between judgment in first instance and appeal, new circumstances gave the case a different complexion. In effect, the question at issue concerned the powers of a testamentary executor to sell immoveables comprised in the succession where the estate was solvent. The issue was really between an alienee from the executor and an alienee from the heirs. The principal, if not the only, debt of any consequence due from the estate was not immediately exigible. It consisted in fact of a loan made by the Land Bank to the *de cujus*, secured by hypothec and amortizable over a period of forty-five years. In the court below it was ardently argued that, this loan being practically the only debt of importance, the powers of sale possessed by the executor and definitely granted to the hodget of appointment, were not exercisable. But the Tribunal relied upon the principles of Moslem law that debts do not in principle survive the death of the debtor and the burden of them must therefore fall only on the *de cujus* (or his estate). This leads necessarily to the conclusion that as between the heirs all debts due from the succession must be regarded as equal in nature, whether they are presently exigible or not. " Le déces du *de cujus* a pour conséquence la déchéance du bénéfice du terme et l'exigibilité de toutes les dettes successionales." The application of this rule was not to be taken to give wider rights to the creditor than he possessed under his agreement—" cependant, au point de vue exclusif des rapports des co-héritiers et de l'exécuteur testamentaire, de la fixation de leurs droits réciproques, et de la détermination de la situation légale de la succession, ce principe doit être pris en consideration."

This being so, the executor's power to sell property to pay debts was properly exercisable. It was, however, contended in the Court of Appeal that since the estate was solvent the power ought not to have been exercised without the concurrence of the heirs. The Court seemed inclined to allow that this would normally be the case, at least to the extent of holding that an executor should come to an arrangement with the heirs as to any sale which might be advisable. But as it was clear that the heirs had obstinately refused to recognize the existence of debts justifying a sale at all, the Court held that a sale by the executor bound the shares of heirs so refusing.

The case is interesting in other directions which do not call for comment here. But one may note in passing that in order to shake the authority of the hodget appointing the executor oral evidence was tendered as to the intentions of the *de cujus*, and to give such evidence value recourse was had to the ancient rules of the Moslem Law of Evidence, which gave testimony a preference over writing (témoins passent lettres). The Tribunal, however, declared that the practice of the Moslem courts clearly shows that this ancient preference no longer prevails.[1]

Acknowledgment.—The next case—that of *Princess Widjan* v. *Mohammed Zaky Pasha*—leads us into another department of Moslem law. (It came before the Court of Appeal on January 14, 1930, and is reported in *Gaz. Trib. Mixtes*, xxi, no. 130.)

In 1922 Prince H., the late husband of Princess W., signed a document acknowledging that he had borrowed £E.60,000 from his wife. As security therefor he assigned his share in certain Wakfs. A year later he signed a further document confirming the loan and security for a reduced amount of £E.50,000. The Prince died in 1927. The Princess sued her co-heirs for £E.43,750, being the balance of the £E.50,000 after deduction of her share in the succession.

The co-heirs raised an exception to the effect that the so-called " Acknowledgment " was only a simulated *donatio mortis causa*, and as such radically void in Moslem law. The Court held (*a*) that the document was not a true Acknowledgment ; (*aveu*) which term included only declarations made after an act was done in order to furnish proof thereof, and not declarations made at the time at which an act is done and as part thereof, and (*b*) that even if it were an Acknowledgment nevertheless it might be attached as a fraudulent simulation. It was not denied that the Princess W. had no separate property out of which she could lend anything—much less £E.60,000.

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[1] See as to this preference of oral over written evidence, Sheikh Bekhit in *l'Egypte Contemp.*, 1919, at p. 128.

Moreover, it was not denied that Prince H. was enormously wealthy, and had no need to borrow from his wife. The only question, therefore, was whether the document was merely a simulated gift *inter vivos*, perfectly legal in Moslem law, or a simulated gift *mortis causa*—which would be radically null. In fact this particular Acknowledgment of liability by Prince H. was only one of a series of almost contemporaneous acts, whereby he purported to strip himself of almost all his property in favour of his wife. But, said the Court, it was quite clear that Prince H. was not in truth imitating King Lear. On the contrary, in spite of all these acts of Acknowledgment and dispossession, he continued imperturbably to receive the whole of the income of the properties up to his death, and to draw cheques against the moneys which he had purported to place to his wife's account in various European banks. Obviously, therefore, his object was not to make gifts *inter vivos* which require delivery—but to make gifts *mortis causa*—to dispossess not himself but his heirs. And such a gift is radically void in accordance with Art. 504 of the Moslem Code of Personal Law.

Gifts.—Two other cases with reference to gifts have a bearing upon the law of succession, since the gifts were made in the last illness and their validity was contested by the heirs upon that ground.

The Mixed Civil Code itself contains a provision (Art. 320), borrowed from Moslem law, to the effect that sales made in the last illness to one of the heirs are not valid unless confirmed by the heirs. It happened that in 1926 General Cherif sold to his wife the Princess Emine a large estate at the price of £E.30,000. The Princess was at the time suffering from a mortal sickness. It was contended that the circumstances showed that the so-called purchase by the Princess was in truth nothing but a disguised gift to her husband. Art. 320, however, could not apply since the act complained of was a purchase and not a gift. Recourse might, however, be made to the provisions of the Moslem law itself, according to which, as stated in the authorized Code of Personal Law, gifts and acknowledgments of debts made by a person in his last illness in favour of one of the heirs are invalid, unless confirmed by the heirs. What then is the "last illness" according to Moslem law? Does it include the whole period of a sickness which eventually proved fatal, or only the closing period of such an illness when death was clearly imminent? In interpreting Art. 320 the Mixed Courts have inclined to the latter view. But in this case, where pure Moslem law was being applied, the Court held that "the last illness" included the whole period of mortal sickness unless the sickness had been interrupted by cessation of danger to life for a year. As in this case death had resulted within less than a year from the sickness from which the Princess was suffering when the disguised purchase was effected, the transaction was set aside as against the heirs who had not confirmed (Court of Appeal, February 25, 1930. *Gaz. Trib. Mixtes*, xxi, no. 152).

A similar case of a slightly earlier date is also reported, *Meguerditchian* v. *Abdul Hamid Fathalla* before the Court of Appeal, May 1, 1929 (*Gaz. Trib. Mixtes*, xxi, no. 153). The late Mohammed Bey Fathalla had died at an advanced age in 1927. For some time before his death his faculties had certainly been failing. Medical evidence described his state as one of senile decay. Some months before his death he had " sold " certain property to some of his sons. The issue concerned the validity of these sales in view of the above-mentioned Art. 320 of the Mixed Civil Code.

One regrets to remark that the approaching decease of the head of the family had led to unhappy and bitter conflict within the family. The court speaks of the " ignoble lutte qui a surgi entre les enfants utérins pour les terrains pendant les derniers jours de la vie de leur père." The Bey had lingered on in a state of great weakness for many months. The dispositions which were the subject of attack were made in the spring of 1923, and the Bey died on June 1. As already stated, the tendency of the Mixed jurisprudence has been to interpret somewhat strictly the scope of the phrase " last illness." Reference to the Moslem law upon which Art. 320 was founded showed that its object was to supplement the general prohibition of testamentary provisions in favour of an heir made to the prejudice of other heirs during the last year of life. In the case of long-standing illness the Mixed jurisprudence tended to fix the date of the final aggravation of the disease as the commencement of the " last illness " for the purposes of the Article. The Court found in the medical evidence ground for treating the end of 1922 as the date of such final aggravation in this case, and in consequence held the questioned sales to be null as against dissenting heirs. This case seems to bring Mixed interpretation more closely into accord with the view adopted in pure Moslem law as illustrated by the case previously cited.

A COMPARISON OF THE GENERAL PRINCIPLES OF CRIMINAL LAW IN ENGLAND WITH THE *PROGETTO DEFINITIVO DI UN NUOVO CODICE PENALE* OF ALFREDO ROCCO. III.[1]

[*Contributed by* W. T. S. STALLYBRASS, ESQ., D.C.L.]

III. PRIVILEGED OCCASIONS.

BY privileged occasions I refer to those cases in which an act otherwise criminal loses that character because of the circumstances in which it is done. The circumstances may be such that the act so far from being illegal becomes a legal duty, such that they afford a complete justification without imposing a legal duty, or such that, whilst not justifying, they reduce the heinousness of the offence. Privileged occasions may be classed under seven heads :

(i) Acts done for the advancement of law or justice.[2]

(*a*) The execution of the sentence of any competent court of justice, provided such sentence be on the face of it lawful.[3]

(*b*) Acts done for the prevention of a forcible and atrocious crime or the suppression of a general and dangerous riot, provided such acts would appear necessary to a reasonable man.[4]

(*c*) Acts done for the suppression or prevention of a breach of the peace, provided such acts would appear necessary to a reasonable man.[5]

(*d*) The arrest of criminals, with or without a warrant, according to the circumstances, and the prevention of escapes and rescues.

In all these cases failure to do the act in question would itself be a crime.

(*e*) A parent or teacher may use force to punish a child or pupil.[6] So also in Italy, " la *vis modica* è mezzo di correzione lecito." [7]

Arts. 55, 56, 57 and 58 of the *Progetto definitivo* would seem to cover this ground. The language of Art. 55 is wide : " The exercise of a right, or the performance of a duty, imposed by a rule of law, or by a lawful order of a public Authority, excludes the offence."

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[1] See previous articles, Third Series, vol. xiii, p. 202, and vol. xiv, p. 45.

[2] See 41 *Harvard Law Review*, 556.

[3] 1 East, P.C., 332–4.

[4] 1 East, 257, 297 ; *R.* v. *Pinney*, (1832) 5 C. & P. 254.

[5] *Timothy* v. *Simpson*, (1835) 1 C.M. & R. 757.

[6] *R.* v. *Newport* (*Salop*) *J. J.*, [1929] 2 K.B. 416.

[7] *Relazione*, ii. 358. Cp. Art. 570 as to excess.

(ii) Obedience to Superior Orders. That obedience to superior orders *per se* is not a defence is a fundamental principle of the British Constitution—the necessary corollary of the two maxims that the King can do no wrong, and *qui facit per alium facit per se.* " The Warrant of no Man," Levinz said [1] in 1693, " not even of the King himself, can excuse the doing of an illegal Act ; for although the Commanders are trespassers, so are also the Persons who did the Fact." Yet of necessity the rule is not without exceptions. We have just seen that the hangman or gaoler who carries out an unjust sentence is protected if the court had jurisdiction and the order had all reasonable appearance of validity.[2] Again, obedience to superior orders may negative a particular intent [3] or the culpability of inadvertence.[4] But in the confused state of the English authorities it is difficult to say exactly how far the exceptions go.

The soldier, as Sir James Stephen pointed out,[5] is in a particularly difficult position. " If a soldier kills a man in obedience to his officer's orders, the question whether what was done was more than reasonably necessary has to be decided by a jury, probably upon a trial for murder ; whereas, if he disobeys his officer's orders to fire because he regards them as unlawful, the question whether they were unlawful as having commanded something not reasonably necessary would have to be decided by a court-martial upon the trial of the soldier for disobeying orders, and for obvious reasons the jury and the court-martial are likely to take different views as to the reasonable necessity and therefore as to the lawfulness of such an order." The *British Manual of Military Law* [6] states that it is " somewhat doubtful " " how far a subordinate could plead the specific commands of a superior officer—such commands being not obviously improper or contrary to law—as justifying an injury inflicted on a citizen." But " so long as the orders of the superior are not obviously and decidedly in opposition to the law of the land or to the well-known and established customs of the army, so long must they meet prompt, immediate and unhesitating obedience." [7]

Probably the English law was correctly laid down by Solomon, J.,[8] in South Africa : " If a soldier honestly believes he is doing his duty in obeying, and if the orders are not so manifestly illegal that he ought to have known they were unlawful, he will be protected by the orders." The German Supreme Court, in the admirably impartial trials of the German war criminals, applied a very similar rule, though the presumption against the unlawfulness of the order is stronger in Germany than in England.[1]

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[1] *Arguendo* in *Sands* v. *Child*, (1693) 3 Lev., p. 352.

[2] *MacKalley's* Case 9 Co. 68 ; cp. *Marks* v. *Frogley*, [1898] 1 Q.B., p. 404.

[3] *R.* v. *James*, (1837) 8 C. & P. 131 ; contrast *R.* v. *Bernard*, (1908) 1 Cr. Ap. R. 218.

[4] *R.* v. *Trainer*, (1864) 4 F. & F. 105 ; *R.* v. *Hutchinson*, (1864) 9 Cox 555.

[5] *General View of Criminal Law*, p. 115.

[6] C. viii, par. 95.

[7] The *British Manual of Military Law*, c. iii, par. 11. It is worthy of note that even by military law in certain cases a soldier may be punished for *not* disobeying orders. Thus in *Field Service Regulations*, pt. i, s. 13, it is provided : " If a subordinate, in the absence of a superior, neglects to depart from the letter of his orders when such departure is clearly demanded by circumstances, and failure ensues, he will be held responsible for such failure."

[8] *R.* v. *Smith*, (1900) 17 C.G.H. 561.

It has been enacted [2] that obedience to the orders of a *de facto* Government, provided it be monarchical,[3] has the same effect as obedience to the orders of a Government *de jure.*

Art. 55 of the *Progetto definitivo* provides that (as in English law) the person who gives the order is always responsible ; he who carries out the order is also responsible unless, owing to a mistake of fact, he believed himself to be obeying a lawful order. It is to be noted that only a mistake of fact provides an excuse,[4] but it is not provided that that mistake must necessarily be a reasonable one. But it is further provided that no offence is committed by a person who carries out an unlawful order when the law does not allow him any power to investigate as to the lawfulness of the order. This would appear to open up a wide field of immunity to persons acting under the orders of the Government. Further, in all cases the punishment may be reduced on the ground that the order provides an extenuating circumstance under Art. 117.[5]

(iii) Self-defence, or "natural necessity" as it was called by the old lawyers.[6] It is only in the case of offences against the person—homicide and the various forms of assault—that immunity from punishment is granted in England on the ground of self-defence. In these cases self-defence will be a good answer to the charge where force is used to repel force, provided the following five conditions are satisfied :

(*a*) The force is used to protect oneself, one's property or some other person [7] from violence or from a reasonable apprehension of it [8] ;

(*b*) There is an honest belief based upon reasonable grounds that there is a reasonable necessity for the use of the force [9] ;

(*c*) No more force is used than is necessary [10] ;

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[1] See Mullins, *The Leipzig Trials* (1921).

[2] (1495) 2 Hen. VII, c. 1.

[3] *Axtell's* Case, (1660) Kel. 13 ; *Cook's* Case, (1660) 5 St. Tr. c. 1113. As to acts done by order of a foreign sovereign (*a*) beyond the limits of his own territory, see Harrison Moore, *Act of State*, pp. 122–31, (*b*) within his own territory, see *ibid.*, pp. 120–2 ; *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718.

[4] *Relazione*, i. 94–5.

[5] So also in England punishment may, at the discretion of the court, be reduced : *R.* v. *Spellen*, (1931) 23 Cr. Ap. R. 130.

[6] *E.g.* Lord Mansfield in *R.* v. *Stratton*, (1779) 21 St. Tr. c. 1223.

[7] Possibly only a parent, child, husband or wife : *R.* v. *Rose*, (1884) 15 Cox 540. But *contra* Denman, J., in *R.* v. *Prince*, (1875) L.R. 2 C.C.R., p. 178.

[8] *R.* v. *Hussey*, (1925) 18 Cr. Ap. R. 160 ; *R.* v. *Turkington*, (1930) 22 Cr. Ap. R. 91.

[9] *R.* v. *Driscoll*, (1841) C. & M. 214 ; *R.* v. *Deana*, (1909) 2 Cr. Ap. R. 75.

[10] *Meade's* Case, (1823) 1 Lew. 184 ; *R.* v. *Sullivan*, (1841) C. & M. 209.

(*d*) The injury done is not out of all proportion to the injury apprehended[1];

(*e*) The defendant himself is "wholly without fault in bringing that necessity upon" himself.[2]

Art. 56 of the *Progetto definitivo* relieves from punishment the person who has done an act, constrained by necessity to defend the right of himself or another against actual danger of an unjust injury, provided the defence is proportioned to the injury. The important points to notice here are that *all* rights may be protected in this way,[3] and the danger, not necessarily the injury,[4] must be actual. A reasonable fear of an actually non-existent danger would not be a defence. The essential foundation of the offence is the relation of *necessity* between the action and the reaction.[5] Excess of force may be of three kinds: intentional, negligent or accidental. If it is intentional the protection accorded by Art. 56 does not apply; if it is accidental then the protection is fully accorded; if it is due to negligence, then by Art. 59 if the act is regarded by the law as a negligent offence the rules regarding negligent offences apply.[6] This Article applies also to the defences of superior orders and of necessity. In England an excess of force whether intentional or negligent negatives the validity of the defence altogether.

(iv) Necessity, or, as the old lawyers used to call it, civil necessity. This in the earlier days of English law was regarded as a good defence.[7] But Hale disapproved[8] of the recognition of necessity as a defence, and in the famous case of *The Mignonette*[9] in 1884 the plea of necessity was rejected in dramatic circumstances. In that case the prisoners had been shipwrecked; on the 20th day in the boat, they killed and ate a boy who was in the weakest condition of the three. Had they not done so they would probably not have survived. It was held that they were guilty of murder, but the sentence of death was afterwards commuted to one of six months' imprisonment without hard labour. Lord Coleridge in the course of an eloquent judgment said: "It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own . . .

> 'So spake the fiend; and with necessity,
> The tyrant's plea, excused his devilish deeds.'"

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[1] *R.* v. *Moir*, (1830) 72 Ann. Reg. 344; 1 Hale P.C. 485–9; Dicey, *Law of Constitution* (8th ed.), pp. 489 *sqq*.

[2] 1 East P.C. 277.

[3] *Relazione*, i. 95.

[4] *Ibid.*, i, 96.

[5] *Ibid.*, i. 96.

[6] *Ibid.*, i, 100.

[7] *Reniger* v. *Fogossa*, (1550) 1 *Plowd.*, pp. 18–20; Bacon, *Maxims*, reg. 5.

[8] 1 P.C. 54.

[9] *R.* v. *Dudley and Stephens*, 14 Q.B.D. 273.

As Grove, J., pointed out,[1] on this plea three lives might be sacrificed to save one.

Since the decision in the *Mignonette* case it is generally said that necessity never provides a defence. It certainly is not a plea that has ever in fact succeeded. But in practice in certain cases no prosecution is ever instituted. The accoucheur who destroys a child in order to save the mother, or the mountaineer who, when two to whom he is roped slip, cuts the rope to save himself from being dragged to death with them, is not prosecuted. And judges have contemplated the possibility of necessity as a defence; thus Wills, J., clearly thought that it would be morally (and presumably legally) right to break a municipal regulation to save life or to put out a fire.[2]

But the question is not one of supreme importance in English law because of the power of the judge to award merely nominal punishment, except in capital cases. And in those, as the *Mignonette* case shows, the Home Secretary can act in a fitting case by the exercise of the prerogative of pardon.

The defence of necessity is recognized in Art. 58 of the *Progetto definitivo*. The person who has acted, compelled by necessity to save himself or others from an actual danger of a serious bodily injury, of which he has not been voluntarily the cause, and which could not otherwise be avoided, is not punishable, provided the act is proportionate to the danger. This clearly affords a defence in many cases in which the plea of necessity would not be accepted in England. But even so the recognition of necessity under the *Progetto* is much more limited than that of self-defence, because self-defence is a reaction against a wrong-doer, whilst in the case of necessity the rights of an innocent person are infringed. Therefore the plea is limited to the necessity of preserving oneself and others from actual danger of serious bodily injury, and then only if such injury can be avoided in no other way.[3]

The *Progetto* treats coercion *per minas* as one form of necessity.[4]

(v) *Salus populi suprema lex.* "For the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action." [5] In spite of the view of a learned writer to the contrary,[6] there can be little doubt that just as such acts would give rise to no civil action so they could not form the foundation of criminal proceedings. But it is certain that only in the clearest possible cases would such a defence be recognized. The proper consideration of the subject involves the whole vexed question of martial law, with which it is beyond the competence of this paper to deal.[1] There appears to be no recognition of the principle of *salus populi* in the *Progetto definitivo* except in so far as it is covered by Art. 58 dealing with necessity.

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[1] 14 Q.B.D., p. 288 n.

[2] In *R.* v. *Tolson*, (1889) 23 Q.B.D., p. 172. Cp. Lord Mansfield in *R.* v. *Stratton*, (1779) 21 St. Tr. c. 1223; *Mouse's* Case (1608) 12 Co. 63; *Gregson* v. *Gilbert*, (1783) 1 Park on Marine Insurance (8th ed.) 138; *R.* v. *Vantandillo*, (1815) 4 M. & S. 73, and for American decisions Beale in 41 *Harvard* L.R. 558.

[3] *Relazione*, i. 97–8.

[4] *Ibid.*, i. 98.

[5] The Case of the *King's Prerogative in Saltpetre*, (1607) 12 Co. Rep. 12; cp. Harrison Moore, *Act of State*, pp. 48, 60–2.

[6] Stroud, *Mens Rea*, p. 310.

(vi) The Consent of the Injured Person. How far this should be a defence in criminal proceedings is a subject of great difficulty. It seems to the present writer that that difficulty is rather shirked by the provision of Art. 54 of the *Progetto definitivo* which enacts that consent is a defence when validly manifested by the injured person " whenever a right of which that person may lawfully dispose is attacked or endangered." This is apart from those cases in which the dissent of the injured party is an essential element of the offence.[2] The failure to define the rights of which a man may lawfully dispose is a confession of weakness which is scarcely concealed in Rocco's *Relazione*.[3] A man, we are told,[4] has the right to dispose of his person for certain objects, *e.g.* games or an operation. If the rules of a game are broken his consent is determined. But consent will not diminish responsibility when the injury means the violation of another right,[5] *e.g.* where the consent is given to an injury in order that a man may be withdrawn from military service or that insurance moneys may be obtained. But assuredly in such a case it seems that the right disposed of is the same as that where a man suffers amputation of his limb to save his life. It is not the right disposed of that is different, but the purpose for which it is disposed of. Can it be said that the consent in such a case is not validly manifested ? Hardly, for that is to argue in a circle. It seems a pity that Rocco should have deliberately rejected [1] the provision in a recent German project that consent renders personal injury to a consenting party unpunishable only if the act is not morally wrong. Such a provision would clearly provide for facts such as those in an old English case [2] where " one Wright, a young strong and lustie rogue, to make himself impotente, thereby to have the more colour to begge or to be relieved without putting himself to any labour, caused his companion to strike off his left hand."

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[1] On this topic reference should be made to Keir and Lawson, *Cases in Constitutional Law*, pp. 368–404, and Dicey, *Law of the Constitution*, Note X, and the authorities there referred to.

[2] Cp. larceny in England : *R.* v. *McDaniel*, (1755) 19 St. Tr. cc. 806–7.

[3] i. 93 ; ii. 388–9.

[4] *Relazione*, ii. 389.

[5] Another right (*altro diritto*) is not the same as another's right (*altrui diritto*). Clearly A cannot by his consent destroy another person's right. But the right violated is then different. Thus if A is in the army and consents to mutilation by B, A's consent cannot be a defence to B for his violation of the State's right to the military services of its citizens ; even if he can provide a defence to an action for the assault to himself. In such a case theoretically the crime would be a violation of the distinct right of the State to have its army protected ; not a violation of A's right to physical integrity. The offence charged should not be personal injury. So in England the right to recover damages for the loss of the bread-winner by death negligently caused cannot be cut down by an agreement by the bread-winner to limit the liability of the defendant in case of injury done to himself, even though owing to the wording of the Fatal Accidents Act 1846, which expressly gives a right of action to the defendants only when the wrongful act is such as would (if death had not ensued) have entitled the injured party to maintain an action and recover damages, the bread-winner can deprive his dependents of the right to bring any action at all : see *Nunan* v. *Southern Rly. Co.*, [1924] 1 K.B. 223.

English law also finds itself in difficulties on this subject. Speaking generally, consent of an individual to an act not useful to the State is no justification : a private person has no authority to consent to a crime. It is well-settled that consent is no defence to murder : suicide-pacts, as we have seen, result in a charge of murder against the survivor.[3] Nor is it a defence if there is a breach of the peace,[4] or to a charge of mayhem,[5] *i.e.* an injury which renders a man less capable of fighting, either of defending himself or of annoying his adversary.[6] It is doubtful whether it is a defence to a charge of infliction of grievous bodily harm.[7] But in the case of other assaults [8] consent is a good defence, and therefore it is an answer to a prosecution for rape, even if in the earlier stages a prisoner's purpose is resisted.[9]

England is a country where sports and games take a big place in life, yet the rule governing injuries suffered in the course of them is not absolutely clear. It seems to be as follows. Where sports are unlawful in themselves, or tend to disturb the peace, or to produce danger, riot or disorder (and all struggles in anger are unlawful), if, in the pursuit of them death ensue, the party killing will be guilty of manslaughter. Sports not unlawful in themselves must yet be exercised with a proper precaution to prevent accidents. " The true test in games . . . seems to be that blows struck in anger or which are likely or intended to do corporal hurt are assaults, but those struck in sport and unlikely to do so are not assaults. All lawful and due care must be exercised. The players must obey the rules without anger, but if the rules are broken only it may not necessarily amount to manslaughter, for it is not criminal or necessarily dangerous or malicious to break rules." [10] The actual breach of the rules is, therefore, less decisive in England than in Italy.

The difficulty is to state with precision the dividing line between those crimes to which consent is a good defence and those to which it is not. It would seem to depend upon whether the mischief extends directly or indirectly to persons other than him who gives his consent or to the public in general.

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[1] *Relazione*, ii. 389.

[2] *Wright's* case, (1604) Co. Litt. 127a.

[3] *R.* v. *Dyson*, (1823) Russ. and Ry. 523.

[4] *R.* v. *Coney*, (1882) 8 Q.B.D. 534.

[5] *Per* Atkin, L.J., in 159 L.T.Jo. 343.

[6] 1 Hawk. P.C. c. 55, s. 1.

[7] *Per* Hawkins, J., in *R.* v. *Clarence*, (1888) 22 Q.B.D., p. 55; Stroud, *Mens Rea*, pp. 329–30.

[8] *R.* v. *Meredith*, (1838) S. C. & P. 589.

[9] *R.* v. *Salman*, (1924) 18 Cr. Ap. R. 50.

[10] Jervis, *Office and Duties of Coroners* (7th ed.), p. 225; cp. *R.* v. *Bradshaw*, (1878) 14 Cox 83; *R.* v. *Young*, (1866) 10 Cox 371; *R.* v. *Moore*, (1898) 14 T.L.R. 229.

Clearly consent is a defence in those cases in which it prevents the offence being committed, *e.g.* to the taking in larceny.[1]

The *Progetto definitivo* contains special provisions as to the effect of consent in relation to particular crimes. Except when the consent is not real, as we should say, in which case the punishment is as for homicide, to cause the death of a person with his consent is punishable by imprisonment from five to twelve years,[2] and the punishment for persuading or aiding another to commit suicide is the same.[3] So also the punishment for procuring abortion is two to five years' imprisonment if the woman consents, whilst if she does not it is eight to twelve years, and if death ensues the punishment is correspondingly diminished if the woman consents[4]—twelve to twenty years if she does not consent, five to twelve years if she does.

Art. 589 of the *Progetto preliminare* reduced the punishment in the case of personal injury to a consenting person. This has been suppressed in the *Progetto definitivo*, and such cases are left to the general rule laid down in Art. 54.[5]

English law has had difficulty in dealing with the reality of consent. In order to be effective the consent must not be obtained by fraud or threats or violence.[6] But fraud does not always vitiate consent. "The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connexion consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. . . . I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done."[7]

In the case of children and other persons of defective intellect there is a difference between consent and submission: every consent involves a submission, but a mere submission does not necessarily involve consent.[8] So under the *Progetto* in cases of injury no effect is given to the consent of "infermo di mente o di persona altrimenti incapace."[9] So in certain cases under the Criminal Law Amendment Acts it is statutably provided that the consent of children under sixteen is no defence.[10]

(vii) Provocation. Somewhat similar to the problem of uncontrollable impulse is the qualified responsibility which the law imputes in certain cases to the man who commits personal violence in the face of gross provocation.

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[1] *R.* v. *McDaniel*, *ubi supra.*

[2] Art. 578.

[3] Art. 579.

[4] Arts. 598, 599. *See also* Arts. 572, 573.

[5] *Relazione*, ii. 398–9.

[6] *R.* v. *Sharpe*, (1857) 7 Cox 214.

[7] *Per* Stephen, J., in *R.* v. *Clarence*, (1888) 22 Q.B.D. 23. Contrast *R.* v. *Williams*, [1923] 1 K.B. 340.

[8] *Per* Coleridge, J., in *R.* v. *Day*, (1841) 9 C. & P. 722.

[9] *Relazione*, ii. 389.

[10] *E.g.* 12 & 13 Geo. V, c. 56, s. 1.

In ordinary cases provocation is an element to be taken into consideration by the court in assigning the punishment.[1] In the case of murder the court has no discretion in fixing the punishment; it is therefore in that case alone that legal recognition is given to the mitigating effects of provocation. In those cases in which provocation is recognized it reduces murder to manslaughter. It is allowed to negative that "malice aforethought" which is an essential condition of the worst form of homicide. In order to have this mitigating effect the provocation must satisfy two conditions:

(*a*) It must be sufficient to deprive a reasonable man of his self-control, so that "the prisoner might be considered as not being at the moment the master of his own understanding."[2] It is not enough that the provocation was sufficient to deprive the particular person charged, *e.g.* a person afflicted with defective control and want of mental balance, of his self-control.[3]

(*b*) The fatal blow must be "clearly traced to the passion arising from that provocation."[4] This is clearly not the case if after the provocation and before the fatal act there is sufficient "time for the blood to cool, and for reason to resume its seat."[5]

With one exception, words in themselves can never amount to sufficient provocation to reduce a charge of murder to manslaughter.[6] "There is no proportion between words and blows."[7] But words may convert an act otherwise insufficient, *e.g.* a slight blow or spitting, into a sufficient provocation.[8] The one exception is where a husband suddenly hears from his wife a confession that she has committed adultery; "a sudden confession is treated as a discovery of the act itself."[9] And murder will be reduced to manslaughter, or possibly to even less than manslaughter,[10] if a man kills another taken in the act of adultery with his wife or kills his wife in such circumstances.[11] In a few cases an act of provocation which is not a legal injury to the accused has been accepted by the courts as sufficient, as in *R.* v. *Harrington*,[12] where, under the impulse of strong resentment caused by seeing his daughter violently assaulted by her husband, the prisoner struck a fatal blow at the husband. But the provocation must not be indirect. There is no authority for the statement that "provocation by one person leading to the homicide of another person by the person provoked is sufficient to reduce the crime of murder to that of manslaughter." [1] So that where a soldier, home on leave, found his wife unfaithful, his child neglected and on the point of death, and cut the child's throat because he could not see it suffer and leave it, he was guilty of murder.

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[1] Cp. *R.* v. *Garner*, (1924) 18 Cr. Ap. R., 125; *R.* v. *Carmichael*, (1931) 22 Cr. Ap. R. 142.

[2] *R.* v. *Hayward*, (1833) 6 C. & P. 157.

[3] *R.* v. *Lesbini*, [1914] 3 K.B. 1116. *Contra* (wrongly) *R.* v. *Lynch*, (1832) 5 C. & P. 324.

[4] *R.* v. *Thomas*, (1837) 7 C. & P. 817.

[5] *R.* v. *Hayward*, *ubi supra*. Cp. *R.* v. *Hall*, (1928) 140 L.T. 142.

[6] *R.* v. *Noon*, (1852) 6 Cox 137.

[7] *Per* Hobart, L.C.J. in *Lord Darcy of the North* v. *Markham*, (1616) Hob. 120.

[8] *R.* v. *Sherwood*, (1844) 1 C. & K. 556; *R.* v. *Mason*, (1912) 8 Cr. Ap. R. 121; *R.* v. *Mawgridge*, (1706) Kel., p. 135.

[9] *Per* Channell, J., *R.* v. *Palmer*, [1913] 2 K.B. 29.

[10] *Per* Atkin, J., in *R.* v. *Greening*, [1913] 3 K.B. 846.

[11] *R.* v. *Maddy*, (1671) 2 Keb. 829.

[12] (1866) 10 Cox 370. Cp. *John Royley's* Case (1612) Cro. Jac. 296; *R.* v. *Fisher*, (1837) 8 C. & P. 182.

Provocation will not excuse under any circumstances acts of barbarity.[2]

There is one class of case in which the excuse on the ground of provocation becomes almost inextricably confused with the defence of self-defence. This is in the case of sudden quarrels. The rule may be laid down as follows. If a sudden quarrel arises, the parties to which fight on fair terms either immediately or at a place to which they immediately resort for that purpose, and one of them is killed, the person killing the other, provided he took no unfair advantage, is guilty of manslaughter only, and not of murder, and it does not matter which of them struck the first blow.[3] Very different is the duel: a death caused in a duel is murder, even though it be entered upon under provocation of grievous charges against character and conduct.[4]

Under the *Progetto definitivo* provocation is by Art. 66 an extenuating circumstance, but not if the defendant mistakenly thinks that there are extenuating circumstances when there are not.[5] So in English law a mere unfounded suspicion that the deceased has committed adultery with the prisoner's wife will not reduce the crime to manslaughter.[6]

The test of provocation under the *Progetto* is "to have reacted when in a state of anger, caused by an unjust act of others." It is noteworthy that the criterion is a "state of anger," not necessarily the anger of the reasonable man. Nor need the reaction be simultaneous if the "state of anger" continues. It may even arise later.[7] The provocation may be by words, as is especially provided in the case of reciprocal insult by Art. 608, where it must, however, be simultaneous, but may provide a complete defence. It also may arise from the act of a third party.[8] These are big differences from the rules that are now well established in English law. The *Progetto preliminare* continued: "Or to have committed the offence in a state of intense emotion, caused by grave misfortune." This is wisely omitted in the *Progetto definitivo*. The judge can give effect sufficiently to such considerations within the limits of the punishments determined by the *Progetto.*[1] It is dangerous to give statutory recognition of any sort to crimes of passion or emotion. Emotional states may diminish punishment, but not responsibility.

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[1] *Per* Reading, L.C.J., in *R.* v. *Simpson*, (1915) 114 L.T. 238. But see *R.* v. *Hall*, (1928) 21 Cr. Ap. R. 48.

[2] *Halloway's* Case, (1678) Cro. Car. 131.

[3] Contrast *R.* v. *Ayes*, (1810) Russ. & Ry. 166 with *Thorpe's* Case, (1829) 1 Lew 171.

[4] *Lord Darcy of the North* v. *Markham*, (1616) Hob. 120; *R.* v. *Rice*, (1803) 3 East 581.

[5] Art. 63 capoverso: *Relazione*, i. 115–16.

[6] *R.* v. *Birchall*, (1913) 29 T.L.R. 711; *R.* v. *Millward*, (1931) 23 Cr. Ap. R. 119.

[7] *Relazione*, i. 116.

[8] *Ibid.*, ii. 407.

To have acted from motives of special moral or social value is recognized as an extenuating circumstance. This will cover some cases of emotion and passion.[2] A " motive of honour," *e.g.* such cases as the finding of a wife in adultery, also provides a special mitigation in cases of infanticide,[3] abortion,[4] and homicide,[5] whilst in such cases a blow that produces no ill effects is not punishable at all.[6]

Somewhat similar to the excuse of provocation in English law is the statutory provision of the Infanticide Act 1922. This enacted that: " Where a woman, by any wilful act or omission, causes the death of her newly-born child, but at the time . . . had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall . . . be guilty of Infanticide " and be punished as for manslaughter, though but for the enactment she would have been guilty of murder. She therefore is treated as having just the same limited responsibility as the man who acts under provocation.[7]

A word may here be said incidentally upon extenuating circumstances. Owing to the wide discretion allowed to our judges, no special provision as to these is necessary in English law. Art. 66 recognizes others in addition to those we have mentioned, including cases in which the malicious act of the person injured has helped to determine the result; but it is interesting to note that just as in England contributory negligence is not a defence to criminal proceedings[8] (though it may mitigate the sentence)[9] so no recognition is given to it in the *Progetto definitivo* even as an extenuating circumstance.[10]

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[1] *Relazione,* i. 116.
[2] *Ibid.,* i. 115.
[3] Art. 577; cp. 592.
[4] Art. 600.
[5] Art. 586.
[6] Art. 586, capoverso 3.
[7] Kenny, *Outlines of Criminal Law* (12th ed.), p. 125.
[8] *R.* v. *Dant,* (1865) L. & C. 567; *R.* v. *Swindall,* (1846) 2 C. & K. 230.
[9] *R.* v. *Stubbs,* (1913) 8 Cr. Ap. R. 238.
[10] *Relazione,* i. 118.

[*To be continued*]

THE INTERNATIONAL CONGRESS OF COMPARATIVE LAW AT THE HAGUE.

[*Contributed by* F. M. GOADBY, ESQ., D.C.L.]

THE Congress of Comparative Law which met at The Hague on August 4–6 of this year was in some respects a new departure, and its remarkable success betokens the interest which the subject arouses among modern jurists. So great a reunion of jurists of all nations could not, however, be brought about without much preliminary effort, and, from this point of view, its striking success is mainly to be attributed to the enthusiasm and ceaseless labours of Professor Elemer Balogh, the Permanent Secretary of the Academy of Comparative Law, and of Professor R. W. Lee of Oxford, his colleague in the secretariat. The annual sessions of this Academy at The Hague have been from time to time noticed in this *Journal*; its endeavours to encourage and correlate the labours of students of Comparative Law have been justified by the success of this Congress. Some 200 jurists attended, including representatives from every country in Europe save Soviet Russia, a large and distinguished delegation from the United States, and smaller bodies of jurists from other American States, from Egypt, from Turkey and from Japan. A munificent gift by the Carnegie Foundation enabled the Congress to meet free of financial difficulties.

The general quality of the membership may be judged by the distinction of the British delegation, which included Lord Hanworth, Lord Macmillan, Lord Justice Greer, Sir William Holdsworth, Sir Leslie Scott, Sir Maurice Amos, Professor Lee (Oxford), Professor Pearce Higgins (Cambridge), and many other representatives of both the older and the provincial universities and of the professional bodies.

The value of such a Congress is not of course primarily to be appreciated by the practical importance of the decisions taken. These have interest as showing the general tendency of legal opinion, but, as is usually the case with international gatherings, the resolutions themselves tend to represent the opinions of the more vocal and earnest members, or to embody a compromise of an indefinite character. What is of value, and of great value, is the opportunity afforded to jurists of varied training and outlook to meet and discuss together matters which are the principal subject of their thoughts and interests in their study, teaching and practice. The organization of the Congress gave full opportunity to every member to take part in discussion upon a varied selection of subjects of common interest to students of Comparative Law.

The Congress opened with a general meeting of members in the Hall of Knights, under the presidency of H.E. Jonkheer F. Beelaerts van Blokland, Minister of Foreign Affairs of the Netherlands. Thereafter the Congress divided itself into sections which met at the Peace Palace. The subjects proposed for consideration were divided among the five sections, each of which was provided with a body of presidents and secretaries. Reports dealing with the matters under consideration were presented by jurists, and were read and discussed in the appropriate sections. The resolutions arrived at were reported to a final general session with which the Congress closed.

Space is not here available to refer in detail to the discussions and decisions. A few points may however be remarked.

In view of the frequent attacks upon the English rule as to liability of the State for Tort, it is interesting to note that Sec. IV adopted a resolution recognizing the general principle of the responsibility of the State, and added, " Pour déterminer le *fondement* de cette responsabilité, il faut maintenir, en principe, l'idée de faute, mais faciliter, à titre au moins complémentaire et exceptionnel, pour telle ou telle matière, l'idée de risque."

Upon the vexed question as to the admissibility of the prosecution of foreigners for acts contrary to a territorial law committed outside the territory, the same Section decided that the State has not only the right to punish acts by foreigners committed outside its territory constituting an attack upon its own security, but that it also has the right to punish such acts even when committed against a foreigner which do not constitute an attack upon its security, subject however to the reserve that the exercise of this right should be limited to serious offences prejudicing the general interests of humanity.

A valuable discussion as to the execution of foreign judgments resulted in Sec. V in the following *vœu* : " qu'une commission d'études, comprenant des juristes des différents Etats, soit chargée d'étudier cette question en vue de poser des règles destinées à servir de base à un projet de convention multilatérale sur la compétence : prie le Bureau de l'Académie Internationale de Droit Comparé de porter ce vœu à la connaissance de la Société des Nations pour que cette haute institution veuille bien y donner suite et, notamment, en constituant la Commission d'études plus haut mentionée."

The question as to the nationality of commercial companies was thus resolved : " La nationalité d'une société de commerce est déterminée par le lieu où elle a reçu l'existence juridique, tous pouvoirs étant réservés aux Etats autres que celui dont la dite société, a la nationalité, de prendre à son égard toutes mesures tendant à la protection de leurs propres intérêts."

Sec. II proved Declaratory Judgments as " la forme la plus elevée et délicate d'exercice du pouvoir judiciaire." Sec. III proposed with reference to Copyright, " suppression de toute condition subordonnant à une réserve ou à une défense préventive l'exercice du droit d'auteur sur tout travail intellectuel publié dans un journal."

These are only fragments of resolutions upon a few of the topics which engaged the attention of the Congress. The range was wide, and the talk free and illuminating.

In conclusion, reference may be made to the discussion of more general subjects which occupied Sec. I. These opened with a paper of great interest by Lord Macmillan, dealing with Scots Law as a subject of Comparative Study,[1] and the discussions, which dealt primarily with legal sources and the organization of legal records, wandered over a wide field. The final resolution arrived at in this Section, and accepted by the Congress at large, favoured the creation under the auspices of the Academy of an International Faculty of Comparative Law having its seat at The Hague, and an International Review of Comparative Law, to be published as the official organ of the Academy. M. Lambert of Lyons, than whom few are entitled to claim more attention on questions of Comparative Law, was an eloquent champion of this scheme. He adumbrated a Faculty with five or six permanent professors teaching juridical history and science, assisted by specialists giving " Conferences " in particular subjects. A scheme such as this of an International Legal University, would not, one may assume, meet with enthusiastic acceptance on the part of English lawyers. We think of Law as a science only with a difference. An International Faculty of Law, which must necessarily be divorced from practice, is likely to appear to English lawyers as of doubtful utility. But however this may be, none who assisted at this Congress can question either the wide interest taken to-day in the comparative study of legal institutions or the renewed zest for this study created by meetings such as this Congress.

[1] See the *Law Quarterly Review*, vol. xlviii, p. 477.

A SHORT ANALYSIS OF THE NEW CHINESE COMPANY AND PARTNERSHIP LAW.

[*Contributed by* J. H. TEESDALE, ESQ.]

FOR some eighteen years past China has been engaged in codifying her laws with the object of bringing them into line with those of the West. The centuries-old Ta Hsin Lu Li (" Statutes and Rescripts of the Great Pure Dynasty ") have been swept away with a stroke of the pen, and a nation, steeped in immemorial customs and tradition, is now to establish by law the equality of the sexes, the modern principles of divorce and trial by jury.

The Chinese are proud and sensitive, and one of the underlying motives for this change is the desire to justify China's demand for the abolition of the existing extra-territorial courts having jurisdiction over " foreigners," resident there, of such Powers as have not, so far, agreed to surrender their Treaty Rights.

The new order of things thus created brings into relief two issues.

To formulate a set of codes may be a long, but is not such a formidable, task where the laws of other nations are available for plagiarism. What principally signifies is the discrimination which must be exercised in the selection of such parts of the old as may be suitably adapted to the new.

Moreover, however tactfully the compiler may have effected the compromise (and China is, *par excellence*, the land of compromises), it is open to grave doubt on the part of those who have watched these short years of transition whether, in the face of those ingrained customs and traditions of thousands of years, Chinese courts are sufficiently independent of outside influences to give effect to the new system.

A few years ago the Nationalist Government decreed that the Gregorian Calendar should in future be observed in place of the immemorial China New Year festivities. These take place in February, and last for three days, on the first of which the Chinese closes his accounts for the past financial year, dons his ceremonial robes and pays calls on his relations and officialdom. It is reported that on China New Year Day last year Chiang Kai Shek, the late President, paid a surprise visit to various government offices in Nanking itself to see how the new law was being observed. Not a solitary official was visible.

Considerable scepticism therefore prevails among foreigners resident in China over the enforcement of the new codes, and whether by relinquishing the substance for the shadow, they will not find when extra-territoriality is gone that all security for their persons and property has vanished. While admitting the contention that ultimately, in order to satisfy Chinese aspirations, the same laws must eventually apply equally to foreigners and Chinese, they feel that, even were the Nationalist Government firmly in the saddle, and the present chaos, which has involved the whole country for twenty years, reduced to normal proportions, China has a long road to travel before her courts which are to administer the new Codes are sufficiently independent to do so without fear or favour. There have been only too many instances, even quite recently, such as the Sheng Kung Pao and Thornburn cases among many others, which go to show that these courts exhibit few signs of functioning without external interference from such as the military or a political caucus.

Foreign residents in China with assets and interests (British assets alone were estimated a few years ago as worth £300,000,000) locked up in the Treaty Ports, who until now have by their Treaty Rights been subject to their own laws, cannot be expected therefore to view the recent negotiations between our Foreign Office and the Government at Nanking for the curtailment of extra-territorial privileges with other than apprehension and misgiving, however anxious they may be to show goodwill towards the new regime.

Such being the *mise-en-scène* in which the aforesaid negotiations have been proceeding, an examination of some of the new Chinese Codes seems opportune.

In a short article it is impossible to do more than confine oneself to one branch of the law. I will therefore select the new Company and Partnership Law.

This publication, in force since July 1, 1931—so far, of course, only applying among the Chinese themselves and between the Republic and foreigners resident there to whom the Treaties now no longer apply—is contained in two volumes entitled *The Nanking Government's Laws and Regulations—Company Law* and *The Tentative Rules for Registration of Companies*. Unlike some of the other new Codes which are partly based on the *Code Napoléon*, the compiler has evidently taken English Company Law as a pattern.

The Laws and Regulations contain 233 sections and the Tentative Rules 64 (or 297 altogether) as against 50 in the English Partnership Act 1890, 385 in the English Companies Act 1929 with its 12 Schedules and 227 Winding Up Rules. The Hong Kong Companies Ordinances 1911, 1915 and 1921 contain 307 sections and 206 Winding Up Rules, while the China (Companies) Orders in Council 1915 and 1919 (which first applied the Hong Kong Companies Ordinances to British companies domiciled in China) contain 28 sections.

There has no doubt been a serious effort on the part of the Chinese compiler to produce something workable, and, for a nation which only a few years ago was quite unacquainted with the ethics of this branch of the law in vogue in Europe and America, the result is a creditable beginning.

But it is undoubtedly crude. There are gaps in the Chinese text, reference to Regulations the whereabouts of which the translator explains he has been unable to locate, and sections which are contradictory and meaningless. It is surmised that a British or American judge would often find himself in a quandary were he called upon to interpret some of its provisions.

It is well at the outset to explain that the translator has used the word " company " all through the two publications, while it is clear from the context that they are intended to embrace not only the Law of Limited Companies, but also that of Partnership.

Companies are divided by s. 2 of the new Law into : (*a*) company of unlimited liability (partnership) ; (*b*) a union of two companies (" a joined company of limited liability and unlimited liability shareholders "—see s. 70) ; (*c*) company of limited liability shareholders (s. 87) ; (*d*) a union of two companies of shareholders (defined in s. 215 as follows : " The shareholders of a joint company with shareholders should have at least one shareholder with responsibility of unlimited liability.")

It is not proposed to deal here with concerns falling within (*b*) or (*d*). These relate to profit-sharing concerns peculiar to the Chinese. As regards (*a*) and (*c*) the most convenient method of examining them so as to ascertain how far the new legislation will affect British concerns doing business with and in China will be to divide them into the following classes :

1. (*a*) Companies with limited liability registered under the Imperial Companies Act and having head offices in Great Britain with branches or agencies in China.

(*b*) Partnerships with head offices in Great Britain and branches or agencies in China.

2. (*a*) Companies with limited liability registered under the Hong Kong Companies Ordinances and the China (Companies) Orders in Council and having head offices in China and branches or agencies in China.

(*b*) Partnerships mainly composed of British subjects with head offices in China and branches or agencies in China.

1. (*a*) and (*b*). In order to ascertain what steps have to be taken towards registration in China by companies and partnerships domiciled out of China reference must be made to the " Tentative Rules for Registration " which conclude with an Addendum entitled " Additional Statement of Methods of Procedure."

Regulation 2 provides that registration shall be effected with the Bureau of the District in which the branch of the company (or partnership) is located, and the time limit laid down in Regulation 55 is six months " from the issuance of these Regulations," s. 5 of the Company Law states that a company (or partnership) not so registered " cannot be recognized." The local agent (whose nationality must be vouched for by his consul) makes the application. The form of application with the appropriate fee (*see post*) must, pursuant to Regulation 4 of the Additional Statement, contain a copy of the company's Articles of Association and the following particulars: A, name of company (or partnership); B, location of head office; C, nature of business; D, total capital of company, branch offices with fixed capital, capital of branch offices; E, date of registration of head office (date of registration in England) and registration number; F, agent's name, age, nationality and residence; and place of registration.

The above indicia seem quite practical and follow the principle adopted for registration in England of companies incorporated abroad which set up a place of business in England (Companies Act, 1929, ss. 343 *et seq.*), except that in the latter case a fixed fee is charged while the fee under the new Chinese law is based on the amount of capital of the company.

Regulation 6 names the fee which is calculated on the registration of the Company's first branch office at the rate of half the capital of the company in conformity with the scale appearing in Regulation 11 (*see post*). Thus the fee payable in respect of some of our large trading concerns with substantial capital will amount to a considerable sum, but as it is not payable annually, perhaps the alternative course of floating subsidiary companies in China with distinct capital will be considered superfluous.

The above provisions regarding registration in China of concerns not domiciled there do not, as they now stand, seem unduly onerous, if it is assumed (and the assumption is a large one) that, so far as the internal administration of the branch concerned in pursuance with the terms of its constitution, there will be no interference by the bureaux and that there is no risk of the schedule of fees being liable to periodical augmentation.

The above remarks bear with greater emphasis on Companies with limited liability registered under the Hong Kong Companies Ordinances, the China (Companies) Order in Council and English Partnership Law as applying in China and having head offices in China and branches or agencies there (paragraph 2 (*a*) and (*b*) above).

In this connexion an important point has to be emphasized in studying the modern Chinese legal system, viz. that methods of enforcement of law in that country differ almost as materially from those of most foreign countries as did the old. Even as under the old regime a territorial official exercised both judicial as well as administrative functions, so under the new it seems to have been impossible to keep those functions in watertight compartments; the only distinction being that the individual has been supplanted by a bureau. Moreover, no machinery has yet been devised by which redress against a bureau can be secured.

The year before last the Municipal Council of the International Settlements of Shanghai invited the Hon. Mr. Justice Feetham to visit it from South Africa to advise—

. . . with a view to assisting them in formulating some constructive plan or scheme, which, while giving full consideration to the aspirations of the Chinese people, will at the same time afford reasonably adequate protection to the great commercial and business interests which have been developed in Shanghai.

With the consent of the Government of the Union of South Africa, Judge Feetham spent eighteen months in Shanghai making a thoroughly exhaustive examination into the whole position. His careful, illuminating and impartial Report to the Shanghai Municipal Council was published last summer.

No apology seems due for quoting *in extenso* two extracts from this Report, as they bring into relief the views of an eminent judge on this serious defect in Chinese legal systems.

Ss. 28 and 29 of pt. iii, ch. vi, of the Report read as follows :

28. The serious effect of the absence of any effective provision for enabling a private individual to obtain a remedy in a court of law in respect of illegal acts committed by the Government, or by officials acting on its behalf, will be more fully appreciated when it is remembered that laws and regulations are frequently made which entrust wide discretionary powers to government officials and organizations, the exercise of which by executive officers, without reference to the courts, cannot be reconciled with effective maintenance of the rule of law. Bureaux of Public Safety, for instance, not only detain persons, without reference to a court, for some time prior to the trial of their cases, but also have power to inflict penalties, of imprisonment up to fifteen days for one offence, and up to thirty days where two offences have been committed, or of fines of limited amounts ; the officials responsible for exercising these powers are not required to sit in public for the purpose, and are regarded as performing administrative acts from which there is no appeal. So far as the exercise of powers of detention is concerned, the question naturally arises : How is the person detained to regain his liberty if he is detained for no good reason, or beyond the period which the law by its terms permits ? Unlawful detention may render the official concerned liable to prosecution for an offence under the provisions of the Criminal Code (Articles 140 and 316), but there is apparently no effective procedure for enabling the detained person or his friends to challenge in the courts the legality of the action of the detaining authority. There are well-known cases of persons being subjected to detention for indefinite periods by the arbitrary exercise of executive authority without reference to the courts.

29. The powers of the bureaux entrusted with the administration of particular laws appear normally to include the power to inflict fines, and to seize property, in respect of which a breach of the law has been or is believed to have been committed, without reference to a court. The Public Safety Bureau can, if necessary, be called on for assistance in the collection of such fines. It also appears to be the practice of administrative bureaux to make orders, without reference to a court, for " sealing up " premises, that is, for closing premises and preventing the use of them, and for these orders to be executed by the Police of the Public Safety Bureau. Thus the old tradition as to the absolute nature of the authority committed to officials still continues.

The Chinese Company Law forms no exception to the criticism outlined above. Take for example ss. 89, 91 and 92.

By s. 89 Articles of Association are to be " null and void " unless the following are clearly stated therein : 1, grounds upon which the company may be wound up ; 2, " issue of preferred shares " [*sic*] ; 3, privileges accorded to founders and their names. No. 2 is not very explicit, but presumably means that the conditions attached to the issue of preferred shares are to be set out.

There is no provision in the Code for the registration of agreements to allot shares for a consideration other than cash (s. 90 of the Hong Kong Companies Ordinance 1911). In place of it the following is prescribed by ss. 91 and 92. When the directors have " taken up office " they must notify the Registration Office (? Bureau) to send scrutineers to see if the shares have been fully paid, ascertain particulars and value of assets other than cash, preliminary expenses, founder's remuneration, etc. If these are found to be excessive or over-estimated, they shall be reduced, or assets given to the full value. It is submitted that such drastic powers placed in the hands of an official afford wide scope for sampling the sweets of Chinese bureaucracy as illustrated by Mr. Justice Feetham. No right of appeal is vouchsafed.

Space does not allow of an exhaustive dismemberment of all the peculiarities presented by the new code or every divergence from the principles of British Partnership or Company Law. A brief reference to a few of them, however, may perhaps be usefully made.

The Memorandum of Association of a company has been described in English textbooks as fixing its powers and objects as between the company and the outside world, and by English law these powers and objects cannot be altered by the company (even if every member agrees) except by special resolution confirmed by the appropriate court. No reference, however, is made anywhere in the new law to Memoranda of Association, nor do they seem to form any part of the scheme.

Allusion has been made above to the difficulty a British or American court would experience in construing some of the sections. Take for example s. 9, which is one of the general provisions and therefore presumably applies both to limited companies and partnerships.

> After registration has been effected should it be found (? by a court or the district bureau) that there are particulars of organization which should have been embodied in the application for registration and were not so embodied, or should changes have been made which were not stated to be changes, the company may not use these things to the detriment of a third party.

S. 12 states : " An unlimited liability company should have more than two shareholders."

The use of the word " should " is frequent in the new law and leaves one in doubt whether it is synonymous with " shall " to the extent that an offence on breach of the terms of the relative sections has been committed. If " shall " is intended in s. 12 one wonders whether a partnership consisting of only two members is prohibited.

No machinery is supplied for the incorporation and registration of " private " companies. In fact s. 87 lays down that a company limited by shares " must have more than 7 persons as founders." Thus the convenient system provided by the English Companies Act and the Companies Ordinance of Hong Kong for the benefit of companies with a few shareholders (and a minimum of 2) most of whom may be working members, who do not require to go to the public for capital, restrict the transfers of their shares among themselves, and who are free from some of the prescribed obligations of public companies is not available under the new law. As probably 75 per cent. of the companies now registered with the Deputy Registrar of Companies at Shanghai under the provisions of the China (Companies) Orders in Council and known as " China Companies " are " private " companies, it will be seen that if and when the new Chinese Company Law becomes effective *vis-à-vis* all companies " foreign " and Chinese alike, an extensive reorganization of the constitutions of " foreign " companies will have to be embarked upon.

The use of the word " limited " is not compulsory. In negotiating business, therefore, with a company or firm in China the only method of satisfying oneself as to its status will be by means of a search at the appropriate District Bureau at a small fee. For the reasons mentioned in the following paragraph this search is not likely to prove very illuminating.

Ss. 127–137 regulate meetings of shareholders. A meeting must be called annually (s. 127), but there is no provision regarding the filing of annual returns. In the latter connexion it is true that under the provisions of General Regulation 8 an inspection can be made of the company's registers at the appropriate bureau, but the absence of any rules for filing of annual returns seems to rob such inspection of much of its value.

General Regulation 8 reads as follows :

> Should there be any change in the company's organization as set forth in its application for registration, such changes *should* [the italics are mine] within 15 days of their taking effect, be notified to the office of registration and an application be made for an amended certificate of registration.

By s. 116, founder's shares cannot be transferred until the company has transacted business for one year. " Founder's shares " do not appear to bear the meaning we would ordinarily assign to them, but refer to the shares subscribed by the original promoters. No definition of " founder " is, however, supplied. Whatever position he occupies *vis-à-vis* the company, it may not prove to be an enviable one, for if any shares are unissued or any calls on them remain unpaid, he has to take them all over himself (ss. 105 and 106).

The minimum number of directors is 5 (s. 138), and the certificates of their qualification shares must be handed to the auditor " to be preserved on the company's premises " (s. 139).

The fees payable on registration range in the case of (*a*) unlimited liability companies and united companies (partnerships) from $15 on a capital of less than $5,000 to $450 on a capital of $4,000,000, and double those sums for (*b*) companies of limited liability shareholders and united companies having shareholders. A company registering an addition to its capital shall be charged a fee on the total of its capital after the addition is made, but the fee paid on its initial registration shall be deducted. The branch registration office shall forward the fees received for registration to the board with a covering letter, but shall deduct $10 to cover charges on fees charged a company on its formation.

To sum up. It will be seen from the foregoing that if (whatever the outcome of the recent trouble between China and Japan) there is in contemplation a resumption of the recent negotiations to lead to a new treaty between Great Britain and China, by which British Imperial and Colonial Statute Law, as the same affects the British corporate bodies and firms specified above, is to be replaced by Chinese Company and Partnership Law, very extensive revisions of the constitutions of those business associations will be essential. By reason of the defects in China's new legislation, to which allusion in this article has been made, it is apprehended that their future business operations in that country are likely to be attended with severe handicaps.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

The Oath under the Irish Constitution.—It was not to be expected that the effort of the British Government to aid Mr. Cosgrave in his electoral struggle by refusing to safeguard in the Statute of Westminster the Constitution of the Irish Free State[1] would have any substantial effect in influencing the decision. Mr. Cosgrave's administration had to face the inevitable tendency of voters to try a new regime when economic depression becomes accentuated, and it is a testimony to the respect felt for the solid work of the late administration that the Fianna Fail party did not secure a clear majority but has to rely on an alliance with Labour, just as the Nationalist party in the Union first won office by a like alliance. Incidentally the supporters of proportional representation are unquestionably justified in holding that it has worked excellently in the Free State by preventing any excessive plurality for any party, and thus moderating Parliamentary action. As Mr. de Valera has candidly confessed, the result of the election is not a victory for republican principles, but no doubt it can be treated as a mandate, though not a very decisive one, for the removal from the Constitution of the obligation imposed on members of the Parliament, and ministers who are not members, to take the oath of allegiance to the Constitution and of fidelity to the King. It is more dubious if the mandate can be held to extend to the mode of removal by unilateral action now determined upon. It is certainly open to the opposition to urge that all that was needed was a negotiation with the British Government on the issue.

The Constitution (Removal of Oath) Bill.—As a matter of fact it is difficult to justify the mode of action adopted in view of the legal issues which it raises. The Bill, which the Dail has passed and the Senate has amended so that it now is suspended in operation pending the possibility of the overriding of the views of the Senate, proposes to remove the obligation to take the oath, and to repeal s. 2 of the Irish Free State (Saorstát Eireann) Act, 1922, which makes the Irish treaty of 1921 the supreme law of the land. The latter proposal may be taken to be a definite admission by Mr. de Valera that the removal of the oath does involve a contravention of the treaty, and as disposing of the former argument that the oath was not imposed by the treaty which merely decided the form of any oath which might be taken. The contention was clearly rendered impossible of defence by the evidence adduced by Mr. Thomas of the contemporaneous interpretation of the treaty provision, though it must remain a matter of surprise that the British negotiators were so negligent as to adopt a form of wording which in itself offers a fair loophole to the Irish contention. But, with this argument gone, Mr. de Valera is faced by another legal difficulty of the most formidable kind. The Constitution itself, by Article 50, allows change only " within the terms of the scheduled treaty," and the Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, which gives the force of law to the Constitution makes the treaty the paramount law of the land. How, then, is the present Bill to be justified in law ? It is, of course, useless to urge that the Statute of Westminster has by s. 2 swept away the doctrine of repugnancy, and therefore the Free State Parliament has become an absolutely sovereign legislature. That argument cannot be used by Irish lawyers who contend that the Constitution owes its validity to Irish action alone, and represents the voice of the people of Ireland. The Parliament of the Irish Free State was deliberately created by the Constituent Assembly as a body of limited powers, and the doctrine that such a body cannot transcend its powers is a fundamental principle of constitutional law as recognized in English jurisprudence and in that of America. The judges of the High Court and of the Supreme Court are subject to the Constitution (Article 69), and they are sworn [1] to uphold the Constitution. It seems, therefore, that, if they keep their oaths of office, they cannot accept as valid the repeal of a part of the Constitution which the Parliament has no power to alter. This difficulty has not been effectively dealt with by Mr. de Valera. It is one thing to say that the Free State should have power to eliminate the oath, another to assert that a Parliament whose power is limited by the will of the people should defy these limitations. Nor of course is it legally correct that the Canadian Parliament can dispense with an oath, for that requirement is entrenched by the fact that the British North America Act, 1867, which contains it is unalterable by the Dominion Parliament.

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[1] See *Journal of Comparative Legislation*, Third Series, vol. xiv, pt. i, pp. 107–9.

The Merits of the Issue.—The action taken is the more regrettable because there are two grounds on which the question might have been disposed of without the friction engendered. In the first place, it is obvious that the allegiance of members of the Parliament does not in the slightest depend on the taking of the oath.[2] Moreover, the history of the republican movement in South Africa shows that the taking of an oath has no effect on those who hold that they should strive for the supersession of the monarchic by the republican form of government. There exists therefore no motive for the retention of the oath if it is disliked in the Free State. Secondly, it is perfectly true that, if Canada desired to abolish the oath, it could secure the result by addresses from both Houses asking for an Imperial Act to eliminate the oath, and the Union, New Zealand or Newfoundland could get rid of it by simple legislation; as it is, Mr. van Hees has suggested such action in the Union. On this ground also it would be impossible for the British Government consistently to refuse to modify the treaty to allow the oath to be made facultative, and, if this were done, the Free State could legislate to this effect without contravening the treaty or seeking to override the Constitution. Probably, however, the power to disregard the Constitution is the vital element in the eyes of Mr. de Valera, for, of course, it must be completely recast if his purpose of establishing a republic is to be carried out, and a prime step to that end would be the decision that it has no binding force on the legislature. That question therefore is of infinitely higher consequence than any issue of the oath.

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[1] See the Courts of Justice Act, No. 10 of 1924, s. 99.

[2] Keith, *The Scotsman*, June 14, 1932, approved by Sir Stafford Cripps, House of Commons, June 17. Sir Thomas Inskip adopted the same view in his speech at Stranraer, August 4.

The Land Annuities Question.—Constitutionally the issue of the refusal of the Free State to continue to make payment to the British Exchequer of the sums due on the head of land annuities, constabulary pensions, and so on is of very minor importance. The Free State Government claims that it has been advised by expert legal authorities that its claim is valid, while Mr. Cosgrave has asserted that legally the Irish Government has not the slightest case. As the advice given to Mr. de Valera is not available in full detail, it is difficult to estimate its value, but on the whole it certainly does not give the impression of being more than an ingenious case, which would have no chance of standing investigation by an impartial arbitral tribunal. This impression is strengthened by the controversy over the selection of such a tribunal which has been carried on between the Irish and British Governments. The type of inter-imperial tribunal agreed on in principle by the Imperial Conference of 1930 would give the Free State the choice of two of a tribunal of five, and these two might surely be trusted to secure in conjunction with the British nominees a fifth member as chairman who would be worthy of trust by both sides. But the British Government has gone farther and offered to consider any other mode of constituting the tribunal which adheres to the essential doctrine of 1930, namely, that none of the members of the tribunal shall be chosen from outside the Commonwealth. To refuse this proposal and to insist on the right of having a foreign jurist in the case seems difficult to understand except on the theory that it is desired to evade arbitration on a colourable pretext. If the demand were merely that the Irish nominees might be foreigners, it might be capable of concession, though it seems strange that the Free State cannot count on the services of two lawyers who could be trusted to support her claims. But the demand must be interpreted as meaning that the decision in case of disagreement must rest with a foreigner, and the British Government cannot be deemed unreasonable if it declines on grounds of principle to accept the view that foreign aid is necessary to determine an issue between parts of the Commonwealth. The war of duties between the Free State and the United Kingdom must be noted as an innovation in British constitutional history of an unattractive kind, but it is of course in accord with Mr. de Valera's general policy of endeavouring to place the State on the basis of self-support by encouraging the development of manufactures financed by Free State capital and of the cultivation of wheat, to make up for the loss of access on easy terms to the British market for cattle and other stock.

The Position of the Governor-General.—An unfortunate aspect of the strained relations between the United Kingdom and the Free State has been the deliberate policy of discourtesy to the representative of the Crown exhibited by the ministry.[1] It is clear that this policy was unnecessary and unwise, for it has never been suggested that Mr. McNeill was in the slightest degree unwilling to co-operate heartily with ministers, who admittedly had no republican mandate, and therefore had no ground on which they could refuse to acknowledge the position of the representative of the Crown. It is obvious that ministers cannot hastily leave an entertainment at a foreign legation, because the Governor-General arrives, without exciting comment, and Mr. de Valera might easily have stopped further difficulties by a little display of tact. As it is, there has been created another innovation of an unsatisfactory character, for the Governor-General has found it necessary to override the formal advice of the ministry and to publish correspondence which they desired to have kept secret. It must be confessed that, if anything can justify the disregard of ministerial advice, the attitude of the Government may be held sufficient warrant for his action. But it may be held that his purpose would have been served better by a simple statement of the facts, without actual publication of letters whose issue was objected to by their sender. Constitutionally, however, the vital point is that the Governor-General recorded the view that the ministry if it commanded the support of the Dáil could secure his removal from office prior to the normal expiry of his term. This is a very interesting but seemingly necessary outcome [2] of the resolution of the Conference of 1930 which gave the Dominions the power to choose their Governors-General in law. There is no statutory provision as to duration of office, and obviously, if one government were to appoint a partisan, a new government on entry into office might well insist on securing his removal. This was, and is, the chief objection to the new departure when it takes the form, as in the case of Australia, of appointing a local man who is almost inevitably regarded by the opposition as chosen partly on party grounds. Formally the King could hardly refuse to act on the recommendation of the ministry to terminate the tenure of office of the Governor-General, for the essential doctrine of the obligation to act on ministerial advice applies, and, even assuming that the grant of local choice was an error, it could not now be undone, nor would any useful purpose be served by an attempt to undo it. The importance of local control is emphasized by the fact that the Governor-General has still the duty of assent to or reservation of Free State Bills. Under the evolution of the constitutional usage, reservation and assent are matters for the ministry, but there is one possible exception, suggested in the case of the Constitution (Removal of Oath) Bill. Is it possible for a Governor-General to assent to a measure which is inconsistent with the Constitution which it is his duty to preserve ? No doubt it is perfectly constitutional for him to assent where there is any doubt possible ; he is entitled to rely on legal advice ; but, if there is clear repugnancy, is he bound to assent to what may be regarded as an action by ministers which falls outside their power ? He is bound to accept advice, it is open to hold, only when ministers have a legal right to tender that advice ; ministers have no legal right to ask his assent to a measure beyond the powers of the Parliament, for they are bound by the Constitution, as is the Governor-General. There can be little doubt that a Governor-General in such a case could constitutionally refuse assent, but there are obviously so many difficulties in the way that it may be expected that no Governor-General is likely so to act, unless he feels that the government is not supported by public opinion. But it must be remembered that in the Free State the powers of the Governor-General to get rid of a ministry are much fettered by the rule that the Dáil cannot be dissolved save on the advice of a ministry which commands its support.[1]

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[1] *The Times*, July 11, 1932.

[2] *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. i, p. 36.

The Commonwealth and New South Wales.—It is a matter for sincere regret that the controversy between the Commonwealth and the State[2] should have had to be carried to extreme lengths. Presumably the defeat of the Labour ministry in the Commonwealth and the advent to power of the opposition strengthened Mr. Lang in his determination to defy the Commonwealth, for a second default compelled action by the Commonwealth. It was now decided in the first place to make it clear by an Act of March 12 that the obligation of meeting the interest due was legally binding on the Commonwealth and could be made the subject of suit in the Australian courts ; this is a very important decision and establishes a principle which before was open to grave doubt. Secondly, the Parliament legislated to provide two methods of securing payments by a State in default. The more formal is that a certificate should be given by the Auditor-General declaring the amount of the default ; then a declaration is applied for from the High Court ; then by motions in the Houses of Parliament authority would be given for the issue of a proclamation requiring the payment of specified State revenues to the Commonwealth, and penalizing payment to the State. In a case of urgency the motions might be passed on the certificate of the Auditor-General, but reference to the High Court must ensue. Authority was further given for the Commonwealth to retain loan moneys payable to the State and to attach bank balances standing to its credit. Further action soon became necessary, though the High Court in an action by New South Wales against the Commonwealth upheld the validity of the Act. New South Wales proceeded to default on the payment of internal debt, and by June 30, 1932, her defaults were estimated to reach £7,200,000. Accordingly, on April 29 a further Act was passed which removed the doubt whether a fresh certificate from the Auditor-General was not requisite as the basis of any new resolution by the Houses specifying fresh revenues to be attached. This was followed on May 13 by the enactment, as a matter of urgency, of an Act intended to annul a measure passed on the previous day by New South Wales providing for the imposition of a tax of 10 per cent. on the amount secured on every mortgage existing in New South Wales. The State measure was not defended by Mr. Scullin, who characterized it as desperate, blundering, inequitable, unjust and impracticable, and even held that it was so much bluff. The power to legislate was claimed for the Commonwealth under its authority as to taxation, insurance, banking, foreign corporations and trading and financial corporations formed within the Commonwealth. On the same day the Governor of New South Wales acted. Mr. Lang had issued to the heads of departments instructions not to hand over the revenues which were under the Commonwealth Acts payable to the Commonwealth Treasury. The Governor was now faced with a clear duty. Prior to this, he had been unwilling to act on the appeals of supporters of the Commonwealth who urged that he should co-operate with that government in the interest of Australian financial credit. Such action would have exposed him to charges of partisanship and might have strengthened the supporters of Labour by enabling them to raise the cry of imperial intervention. But now the issue arose of his duty to the Constitution of the State and the Commonwealth alike. The laws of the Commonwealth are binding on the States and their people, and it was clear that Mr. Lang was disobeying the law of the Commonwealth as declared by the High Court, to which he had appealed in vain. He accordingly could only be permitted to continue his action at the cost of rendering the Governor his supporter in defying the law of the country. Sir P. Game therefore took the only legal and constitutional course left open : he asked the Premier to withdraw his instructions because they were illegal and to allow the law to take its course. When Mr. Lang refused, he removed him from office, and appointed a cabinet *ad interim* which was granted a dissolution, and secured the necessary majority to homologate the Governor's action. Moreover, it now became possible to reach accord with the Commonwealth, which therefore gladly suspended the Acts which it had passed. It is undeniable that these Acts mark a grave inroad upon State authority, and this was duly noted in the Commonwealth Parliament, but the issue was urgent and the responsibility clearly lies with the State which attempted to involve the whole of the Commonwealth in the disaster of repudiation. Clearly the interest on the debt would have had to be met, and that would have meant that the other States and their people would have had to pay the debt of New South Wales, a quite intolerable position. But the task left to Mr. Stevens by his predecessor is a very difficult one. For the time being, however, the reaction in New South Wales against the policy of default renders it needless to press for the policy of reconstruction of New South Wales into lesser areas with drastically revised Constitutions as demanded by the United Country Movements of New South Wales.[1] The grounds for these movements, however, are of a character which will survive the relaxation of the immediate crisis, and there is no doubt of the utterly unsound position of the State in the Federation, with its enormous population largely concentrated at Sydney, which secures an abiding predominance of industrial over agricultural and pastoral interests.

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[1] On October 3 the King, on the advice of the Government, removed Mr. McNeill from office, thus facilitating complete control by Mr. de Valera of the representative of the Crown. His Majesty's action was as completely constitutional as it must have been distasteful, in view of the fact that Mr. McNeill's only fault was his assertion of the duty owed to the representative of the Crown. The removal was followed by another abortive Conference in London to deal with the financial issues.

[2] *Journal of Comparative Legislation*, Third Series, vol. xiv, pt. i, pp. 112, 113 ; cf. vol. xiii, pt. iv, pp. 255, 256.

The Functions of the Governors.—The New South Wales case illustrates the great difficulties which arise when the prospect is envisaged of the adoption for the States of the rule of local appointment. If Mr. Lang's nominee had been in office in place of Sir P. Game, he would clearly have been unable to exercise the necessary authority to remove Mr. Lang from office. The truth is that the Dominions, when they insisted on the right to make local appointments, failed entirely to appreciate the actual importance of the King in the working of the Constitution of the United Kingdom. They conceived the position to be one of an honorary character, and they ignored the fact that it rests with the King in the long run to act as the one safeguard of the State from the misuse of the powers of a ministry supported by a House of Commons elected in some crisis. In any case it would be very difficult for the Governor-General or Governor to command the measure of practical authority appertaining to the Crown, so different are the conditions of life. But, when the representative of the Crown is a mere *protégé* of the ministry, it is idle to hope that he will resist the government which gave him office. Moreover, if there has been a change of government, clearly the new ministry will not be prepared to acquiesce in opposition from an officer whom they will regard as a mere partisan. There is no doubt that the former position when the British Government offered suitable persons to the Dominions was constitutionally a wiser method of action and that the present system gives the Dominions constitutions without the safeguards of any kind against the actions of a ministry which commands a majority in the legislature, at least if the upper House is of limited powers. In such a case the life of Parliament might easily be prolonged in defiance of the rights of the electorate. Risks, which may be regarded as not of primary importance in the case of a Dominion, are obviously more serious in that of a State, and this element should be weighed by the States before they decide to turn the office of Governor into a mode of providing for supporters.

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[1] See *State Reconstruction or Anarchy?* a copy of which I owe to the courtesy of Dr. Earle Page, M.P.

The New Canadian Letters Patent.—It is perhaps disappointing that, when it was decided by Mr. Bennett that new instruments should be issued as the outcome of the decision of the Imperial Conference of 1930 regarding the mode of appointing the Governor-General, nothing should have been done to clarify their terms. Although the former Letters Patent have often been criticized,[1] it has been thought satisfactory to reissue them with infinitesimal changes, the most vital being that which omits the power of the King to give instructions through the Privy Council or a Secretary of State. The power to instruct, however, remains and at once the question arises of its propriety. The British Government has abandoned the right to instruct, and it is surely impossible to say that the Canadian Government has the right to instruct the representative of the Crown, but that is to what the Letters Patent reduce the matter. No doubt the requirement that instructions must be given under the sign manual and the signet involve the use of a British Seal, but the fact remains that, if any instructions are given, they will be given by Mr. Bennett. Clearly the power to give instructions should have been removed altogether. It is a relic of a state of affairs that is outworn. Worst of all is the fact that the Royal Instructions are still issued with the command to the Governor-General in cases where imperial interests or foreign issues might be concerned to take these factors into personal consideration together with the advice of ministers in regard to the exercise of the prerogative of mercy.[2] Surely it is quite unfair for the Canadian Government to seek thus to throw an onus on the Governor-General to disregard, if personally he thinks it right, their advice. The power to disregard such advice has long been in practice absolutely dead, and the whole of the Royal Instructions should have been dropped as out-of-date and needless. Similarly it is useless to repeat the clauses (III–V) of the Letters Patent which delegate powers of appointment and removal of officers and of summoning and dissolving Parliament. These are covered by statute and no longer rest on prerogative. Nor is it necessary to keep the rule that the commission must bear the signet, though the countersignature will be Canadian. For all purposes it would be better to make the appointment under the Canadian Seal, and avoid the appearance of responsibility which the use of a British Seal involves. On this head it is impossible not to agree with Mr. McGilligan. If the use of British Seals is automatically given to other ministries, the use of the Dominion Seals is far wiser, as marking the true responsibility. Nor since Mr. McGilligan published the facts is British reticence really worth while. On the other hand, it is no doubt wise to repeat the terms of the existing instruments as to the ambit of the powers of the Governor-General. To make any change would have been impossible so long as it is not intended that the Governor-General should have a delegation of the external prerogatives of treaty making, of accrediting ministers, and of declaring war or neutrality. The present policy of the Dominions and the British Government on this issue would have to be deliberately changed after consideration by an Imperial Conference before this question could be decided in the sense of an extension of the authority of the Governor-General. Even as it is, it may well be that the courts in Canada would accept the change of position laid down by the Conference of 1926 as exempting him from suit whether on official or even on private grounds. Fortunately the matter is now becoming a mere issue of theory.

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[1] Keith, *Responsible Government in the Dominions* (1912), iii, 1562–4.

[2] The Instructions are not even amended to remedy the omission of giving power to pardon crimes committed outside, but tried in Canada.

The Ottawa Conference.—In the constitutional aspect the Ottawa Conference is of special interest because of its insistence on the unity of the Empire, primarily for economic ends, but, arising out of these ends, for political purposes. The vital issue which raised this point was that of inter-imperial preferences. If the Dominions were distinct members of the League of Nations, if they were also signatories of the Kellogg Pact, could they be denied the status of distinct States at international law ? If so, could it not be held that pacts as to matters economic were treaties which must fall under the ordinary regime, so that foreign powers under the most-favoured-nation clauses of their treaties could demand the concessions made between the parts of the Empire ? Obviously this would have made preferences unavailing, and accordingly the Dominions and the United Kingdom agreed to maintain the doctrine that inter-imperial relations are not subject to international law, so that the preferences remain confined to their recipients by agreement. Moreover, they concurred in the view that all parts of the Empire should in future treaties take precaution to prevent hampering themselves by undertakings to give foreign powers preferences of an inter-imperial character and should consider existing treaties to secure harmony with this doctrine. This means, of course, that the Union had to cancel the clause in the German treaty of 1928 [1] which concedes to Germany future British preferences. The concession was at the time deemed unwise by General Smuts and there is no proof that it ever was worth making. The other treaty aspect of importance is Canada's insistence in the agreement with the United Kingdom that, if either government finds that the preference it has undertaken to give is rendered nugatory by the state action of a foreign power, it will use the right to prohibit entry of the commodities affected, until it secures the position of the preference. In plain language, Canada is to be assured of effective protection in this way against the dumping in the United Kingdom of Russian exports, especially, of course, lumber which Canada regards as a trade of high importance, while

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[1] *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, pp. 125, 126.

Russian dumping is oppossed also to the interests of the Scandinavian countries. The British Government by acting on this agreement runs the risk of finding it necessary to get rid of the protocol to the temporary commercial agreement of April 16, 1930, and it may be necessary to proceed to further revision of treaty clauses. But the solidarity of the Empire is of paramount concern. Further, the fact that the colonies and protectorates are provided for in the agreements is a welcome reminder of their importance to the Dominions as well as to the United Kingdom, and completes imperial unity of action. The unfortunate circumstances which prevented agreement with the Free State did not preclude that territory securing agreements with the Union and Canada, but it must be admitted that the chance of serious development of trade between the Free State and these territories is not of substantial importance. Canada had already allowed her treaty with France to lapse in order to clear the way for her action in furthering trade within the Empire. The limited duration of the agreements, five years, with the power to terminate on six months' notice then or thereafter, is constitutionally sound, for both in the United Kingdom and in Canada the opposition have the right to object to the fettering of future action beyond the period of control which the present governments of these countries can reasonably contemplate ; in the United Kingdom the Liberal Ministers, who have resigned in defence of Free Trade, have strongly condemned the agreements on the score that they derogate from Parliamentary control of taxation. The exception in the case of the promise of a British preference on tobacco for ten years is technically open to criticism, but practically it is of minor consequence as it affects a mere luxury. On the economic side the Conference doubtless established most clearly the impossibility of any close approach to inter-imperial free trade, and the impracticability of a common currency system or even of a central bank system in each part of the Empire, but it displayed the United Kingdom as willing to make large concessions, even involving taxation of wheat and meat imports, in order to assist the Dominions in restoring their prosperity. It was made clear that the Empire Marketing Board could not receive Dominion subsidies, though it was admitted that the new policy of grant of preferences eliminated the original cause of its creation, the desire to make up to the Dominions indirectly for the inability to give the preferences proposed at the Imperial Conference of 1923, and the decision of the British Government to continue its operations for a further period is another striking illustration of its desire to spread the use of Dominion products. It may be hoped that in the Union the Conference will effect such a change of outlook as will in future preclude ministerial refusal to extend any countenance to a " Buy British " campaign in Johannesburg. There is no doubt that reciprocity in goodwill is essential if the full benefit of inter-imperial preferences is to be obtained. Ottawa further revealed the enormous expansion of Canadian manufacturing industry and the extent to which it was based on United States capital, a factor which opposes an effective barrier to the grant of any such preferences to the United Kingdom as would interfere with the expansion of such trade. But both the Dominion and the Commonwealth of Australia consented to allow British manufacturers to present to their Tariff Boards the case against undue increases of tariffs, and agreed not to encourage merely exotic industries.

Canadian Power of Extra-territorial Legislation.—It is rather surprising that the Supreme Court[1] of the Dominion should have reversed the decision of the Supreme Court of Nova Scotia in *Dunphy* v. *Croft*,[2] rendering necessary the overruling of the Supreme Court by the Privy Council.[3] The issue was a very simple one. Could Canada legally provide for the seizure and confiscation of a ship registered in Canada because it was found hovering within twelve miles of the Canadian coast with dutiable goods aboard ? It will be noted that the legislation was deliberately limited in character, and it is difficult to see how its validity could be denied. The Privy Council had no difficulty in holding that no limitation was inherent in such a matter in the status of Canada as less than an independent State. The power to legislate as to customs must be regarded in the light of the British power in 1867, which served as a sound mode of interpreting the ambit of powers given by the British North America Act. It was clear that the United Kingdom claimed the power to deal with hovering vessels and used the twelve-mile limit as a criterion. Moreover, international law writers recognized the existence of such a right, so that there was no principle of international law to be considered, even apart from the fact that the rule was clear[4] that a British court must obey a British statute, even if it seemed to offend against the rule that jurisdiction did not extend beyond territorial waters proper. This mode of consideration excluded therefore any necessity of deciding whether the Statute of Westminster, 1931, s. 3, conferred power of extra-territorial legislation retroactively, and Sir T. Inskip declined to intervene because in any case the issue could not in future be disputed. What does not appear is how far the British legislation is in practice acted upon, especially as regards ships not registered in the United Kingdom, for that would have been valuable guidance to the Dominion if she decides to remove the narrow restriction of her present legislation to Canadian registered shipping.

Canada and the Treaty Power.—Another very interesting decision of the Privy Council deals with the question of the control of radio communication in the Dominion.[5] It is of great importance, for, though the result achieved is one which on the whole appeals to Canadian opinion, the mode of arriving at it has been severely criticized by Mr. Ewart.[6]

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[1] [1931] S.C.R. 531.

[2] [1930] 4 D.L.R. 159.

[3] *Croft* v. *Dunphy*, 48 T.L.R. 654.

[4] *Mortensen* v. *Peters*, 8 F. (Just.), 93, 101, *per* Lord Justice General Dunedin.

[5] *A.-G. for Quebec* v. *A.-G. for Canada*, [1932] A.C. 304.

[6] 10 *Can. Bar Review*, 298.

The basis of the opinion of the Committee is simple ; it admits that the Radiotelegraph Convention of 1927 is not such a treaty as falls within the sphere of s. 132 of the British North America Act, 1867, authorizing Canada to legislate to implement Empire treaties, but the Committee thinks it comes to the same thing ; Canada has bound herself by a Convention ; foreign countries must look to her to enforce it ; therefore it can be enforced under the general power of legislation given by s. 91. Even the claim of the provinces to regulate inter-provincial radio communication was ruled invalid. It was held that the reasoning in the Aviation [1] case could be applied ; the field was so fully covered by the Convention that it left no space for the provinces to cover by their legislation. Further, the matter could be brought under the authority of the Dominion under s. 92 (10) to control lines of telegraphs and other works and undertakings connecting the province with other provinces or extending beyond provincial limits. On this score the control of reception even of wireless messages was not provincial, a result no doubt consonant with common sense. But it is argued by Mr. Ewart that, while the result could and should have been based on s. 92 (10), the result is achieved in a manner which was not suggested by the Dominion Government nor by its counsel and of which no Canadian lawyer could have thought. The provinces, he argues, are given certain subjects of legislation to the exclusion of the Dominion. It is wholly contrary to the Constitution to assert that Canada has the legal power to make a treaty on these subjects, and then to enforce it by legislation, overriding the deliberate purpose of the Constitution. The decision therefore adds another peculiar twist to the Constitution. The criticism is weighty, but it is right [2] to point out that the view taken by the Privy Council is one long foreseen, and one which has arisen from the relaxation of Imperial authority over the Dominion. So long as the power to make treaties affecting Canada was virtually in the hands of the British Government, it doubtless would not have acted in a provincial matter without assurance of provincial assent. But, now that Canada has in effect the treaty power, the position is changed, and there is now no legal control, in view of the attitude of the Privy Council, over Dominion invasion of the provincial sphere. The matter must rest on the sense of respect for the Constitution of the Dominion, and it is right to say that the Dominion has so far used its authority merely in matters which can fairly be held to be under its general control on one ground or another, as in the commercial treaty with Japan, the migratory birds convention with the United States,[3] and the issues of aviation and radiotelegraphy. No doubt the decision simplifies action as regards the important St. Lawrence Waterway Treaty of July 18, 1932, but the essential feature of that compact is that Ontario is a willing party, though Quebec has objections, and in a great international issue it would be impossible to compel the Dominion to meet all provincial objections, however natural may be the feelings of anxiety regarding the future of Montreal under the new scheme and the injury done to water-power concerns in Quebec by the proposed important developments in Ontario as part of the scheme for an effective waterway to the Great Lakes.

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[1] [1932] A. C. 54 ; *Journal of Comparative Legislation*, Third Series, vol. xiv, pt. i, pp. 114, 115.

[2] Keith, *Imperial Unity and the Dominions* (1916), pp. 421, 422 ; *Journal of Comparative Legislation*, Third Series, vol. xi, pt. i, pp. 121–4.

[3] Keith, *Responsible Government in the Dominions* (1928), i, 579, 580.

Canadian and Empire Treaties.—It is important to note that the Committee was unable to interpret s. 132 as applying to a treaty of the Radiotelegraph Convention type, while the Aviation case was decided on the basis that the Air Navigation Convention of 1919 was an Empire treaty. "As regards aviation there was a treaty, the Convention here is not a treaty as such between the Empire and foreign countries, for Great Britain does not sign as representing the colonies and Dominions. She only confirms the assent which had been signified by the colonies and Dominions who were separately represented at the meetings which drafted the Convention." There is something wrong here as to confirmation, but what is much more important it must be remembered that in the Air Convention also the British Government did not act for the Dominions, which were represented by their own delegates and signed separately. The better ground of distinction which might have been taken would have been that (1) in form that treaty was one for the British Empire, and (2) that under it the Dominions were united with the rest of the Empire in the possession of a solitary vote, though under later arrangements distinct votes are to be accorded. In any case the decision is of the highest interest as another landmark in the development by the jurisprudence of the Privy Council of the implications of the antiquated Constitution of the Dominion, and it must suggest once more the reflection that the time is really come when that instrument should be revised to adapt it to changed circumstances and that it is unjust to Canadian statesmen to suppose that they are unfit to face the task.

Provincial Authority over Companies.—At the same time the Committee has once more displayed its determination to protect provincial powers, by affirming the validity of the Security Frauds Prevention Act, 1930, of Alberta.[1] The Act is on the lines of much provincial legislation of recent date intended to protect the public from dealing in unsound shares. It provides for the registration of share brokers, and authorizes the Attorney-General to conduct inquiries into the affairs of companies with a view to ascertain if any offence against the Act or the regulations under it is being committed. These powers were attacked by Dominion companies on various grounds. It was urged that the Act aimed at crippling the operations of Dominion companies and thus rendering them incapable of exercising their rights under Dominion incorporation. But this view was repelled by the Committee, which pointed out that there was nothing unfair in any company which dealt in securities in the province being subject to the general law as to such dealings, just as it must obey the law of land holding or of liquor control. The inquiries were within the power of the legislature, which within these powers was sovereign in its choice of remedies. Nor did the Act really infringe on the sphere of criminal law, though one section might be expressed too widely, but in that case it was severable. It is clear that the result is eminently just, and that any other finding would have been decidedly contrary to the public interest.

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[1] *Lymburn* v. *Mayland*, [1932] A.C. 318.

Rival Crown Priorities in the Dominion.—In *Attorney-General for Quebec* v. *Attorney-General for Canada* [1] the issue involved a rather amusing and very expensive dispute as to Crown priorities in respect of a small sum representing the surplus assets of a bankrupt company in Quebec. The Dominion claimed under s. 17 of the Special War Revenue Act, 1922, under which " notwithstanding the provisions of the Bank Act and the Bankruptcy Act or any other statute or law " the Crown should have priority in respect of the sales tax. On the other hand, Quebec claimed priority under the legislation as to taxation of corporations. It is clear that, if the matter had stood simply thus, the Dominion must be preferred, as the Supreme Court held. But the issue was complicated by s. 16 of the Interpretation Act, which expressly lays it down that no statute binds the Crown unless this is expressly stated. Could, therefore, the words " or any other statute or law " be deemed to include the Interpretation Act ? Duff and Rinfret JJ. held not, contrary to the view of the majority of the Supreme Court,[2] but the Committee agreed with them. The Interpretation Act overrides and must be specifically barred if it is not to operate. That is clearly sound law, for the purpose of such an Act is to guide all interpretation ; it must be assumed to be known to the makers of laws, and they must so enact as to bear this consideration in mind. More important was the contention that the Interpretation Act s. 16 did not apply where the Crown was being benefited as opposed to being subjected to obligations ; but that was disposed of easily by the sound criticism that the grant of a favour to the Crown in the Dominion was a disadvantage to the Crown in the province. The Crown was one, but there were distinctions as regards Crown revenues and property. The result therefore in logic was to prefer Quebec, but the local government only asked for equality of distribution so that any remnant of the fund will thus be distributed. The question must arise whether it was really worth while carrying this litigation to the Privy Council.

Leave to Appeal in Quebec.—In *Davis* v. *Shaughnessy* [3] the issue was raised of the effect of the attitude of the judge of the Court of King's Bench in Quebec in expressing no opinion on an application for leave to appeal to the Privy Council under Article 68 of the Civil Procedure Code. The law of Quebec provides for appeals, in lieu of leaving the issue to Order in Council, and in terms it permits appeals in certain classes of issues, including matters in which the future rights of the parties may be affected or the amount of the thing demanded exceeds $12,000. The question at issue fell under both heads, and it would seem *a priori* that the appeal lay without any permission at all. But the applicants made formal application to the court for leave, in accordance with the normal practice, without admitting that it was necessary. The judge simply granted *acte* of the petition and of the security bond to prosecute the appeal, and Lord Shaughnessy applied to the Privy Council to quash the leave alleged to have been given. The real issue, of course, was whether any leave was necessary at all. On the face of the Quebec Act one would hold that the suitor has the right to bring his appeal and that the Quebec Court has no power to deny the appeal. But the Privy Council held otherwise; it explained the ambiguous judgment in *Gillett* v. *Lumsden*,[1] an Ontario case, and it is now clear that (1) in any case where, as in Ontario and Quebec, the appeal appears to lie without the approval of the court below, that appearance is misleading; the court below must definitely allow or disallow the appeal, its duty being to allow where in its view it falls within the conditions laid down. (2) If the appeal is allowed, the Committee will hear it; apparently it will not be open to the respondent to deny that the appeal lies, but the Committee may not have intended to cover this point. (3) If it is disallowed, petition can be made to the Privy Council for special leave to appeal, but it does not follow that such a petition will be granted, as special leave is a matter of discretion, not of right. This is a very important decision, and at first sight it seems to cut down very seriously the extent of the authority to appeal given by statute. But it must be remembered that it no doubt rests on the fact that from the first in Canada [2] the practice was for the Crown to lay down the conditions of appeal, and for the local authority to decide whether the appeal should be allowed under these conditions. The arguments in favour of this procedure are obvious; it is most important that the local court should decide if the conditions are fulfilled, and it further has in any case to see that due security is given to prosecute the appeal. In the actual case their lordships adopted the view that the judge had in effect granted leave to appeal by taking note of the petition and of the security bond, and refused to quash the leave, holding that manifestly the case fell within the conditions of the Civil Code. In the Ontario case, it is now explained, appeal was not permitted, because the case did not fall within the terms of the Ontario Act, not because the court below had failed to pronounce on its admissibility. It is, it must be admitted, most satisfactory to have that explanation.

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[1] *A.-G. for Quebec* v. *A.-G. for Canada* ; *Silver Brothers, In re*, 101 L.J.P.C. 107.

[2] [1929] S.C.R. 557.

[3] [1932] A.C. 106.

The Privy Council and the Commonwealth Constitution.—It must be regarded as a matter open to question whether, as the Privy Council is cut off from dealing with appeals in all constitutional issues involving the rights of the Commonwealth and the States *inter se*, it is wise that it should be asked to intervene to deal with those minor constitutional issues which may escape this prohibition. After all, the Constitution of the Commonwealth is best treated as a whole, and decisions given on one aspect may be unfortunate when the whole subject-matter is beyond the jurisdiction of the Committee. It is clear indeed that the interpretation of s. 92 of the Constitution which provides that trade, commerce and intercourse among the States shall be absolutely free is a matter not excluded from the jurisdiction of the Privy Council. There cannot be any issue as between Commonwealth and State. Whether the prohibition has no application, as some hold,[1] to the Commonwealth but binds the States, or whether it binds both, makes no difference. It is not an issue of limiting the authority of the one in favour of the other, and opinion in the Commonwealth had already recognized this fact. But the right to appeal does not necessarily mean the grant of leave, which is at discretion, and the result of the discretion, though its legal validity may be admitted by many even in Australia, is doubtless unfortunate. The case in which it was exercised arose out of the deliberate efforts which are being made in Australia by co-operation between the Commonwealth and the States to effect the orderly marketing of the dried fruits produced in large quantities in part by ex-soldier settlers. To permit unrestricted competition in the Australian markets would reduce prices to vanishing-point, and so an effort has been made to secure that crops raised are disposed of in part overseas, in part in Australia, on terms which secure that the home market shall not be swamped and that what can be realized shall be fairly distributed among the several producers. Now s. 92 of the Constitution is opposed to such action by requiring freedom of trade. The lawyers and courts of the Commonwealth in their national need devised a mode of getting round a like difficulty and decided in the *Wheat Case*[2] that it could be surmounted by legislation authorizing the Crown in the State to expropriate the crop, when as it became its private property it could dispose of it at its pleasure, despite the provisions of s. 92 which then could not come into operation. On the strength of that decision, which has generally been approved in the Commonwealth, a like effort was made in South Australia to deal with the dried-fruit problem, and it is this effort which, after being held valid by the High Court,[3] the Privy Council[4] has pronounced incompatible with s. 92, agreeing with Isaacs, J., against Knox, C.J., Gavan Duffy, Rich and Starke, JJ. The Committee will allow the validity of action of the kind only in such a matter as national defence, prevention of famine, disease and the like, and it evidently holds that any other view

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[1] [1905] A.C. 601.

[2] S. 17 of the Royal Instructions of 1768; s. 4 of Royal Instructions of 1791; ss. 30 and 31 of the Lower Canada Act, 34 George III, c. 6.

[1] *W. & A. McArthur, Ltd.* v. *Queensland*, (1920) 28 C.L.R. 530.

[2] *New South Wales* v. *The Commonwealth*, (1915) 20 C.L.R. 54.

[3] *James* v. *Cowan*, (1930) 43 C.L.R. 386.

[4] *James* v. *Cowan*, (1932) 48 T.L.R. 564.

is to mock the Constitution. Thus private interests are authorized through the Constitution to override the national interests in a marked degree, and there is no remedy save the impossible one of a constitutional alteration. Obviously the view of the Privy Council is one easy to take, but it seems to have overlooked the fact that a complex Constitution like that of the Commonwealth cannot be made to work by merely interpreting literally its several provisions. The very able judges who decided the case in the High Court evidently recognized that the *modus operandi* adopted was open to doubt, but that it was necessary to rely upon it in the interests of the people of the Commonwealth. On the whole, it certainly seems that this is a matter on which it would have been wiser to refuse leave to appeal. But the Commonwealth Parliament has the remedy in some degree in its own hands, for it can clearly cut off appeals on such issues, and there are strong grounds for holding that constitutional questions should either all be subject to the Privy Council or should all be subtracted from its sphere.

The New South Wales Legislative Council.—There need be little said of the refusal of the Privy Council [1] to allow the Colonial Laws Validity Act 1865, to be interpreted to have no value as a means of safeguarding constitutional arrangements from light-hearted change. If the contentions of Mr. Lang, whose appeal to the Privy Council contrasts curiously with his attack on British investors and his refusal to pay the interest on their loans, had prevailed, the legislature of New South Wales would have been turned into a body in its own sphere sovereign and incapable of binding itself to any special mode of effecting constitutional changes of importance. It was hardly to be expected that the Privy Council would accept this view, still less that it would wander out of the course to decide even by *dicta* the other conjectural situations which were propounded by counsel. Mr. Lang's defeat in any case ensures the Council a new lease of life, and the issue now is whether it can be constituted on the basis of election by the Houses, with a membership of forty-five, holding office for six years, a third retiring every two years, thus serving as a steadying influence in the State. This must be determined by referendum after acceptance by the Houses, and the outlook is uncertain. It is clear that reform is long overdue, and that its accomplishment is now very difficult. The parallel with the case of the House of Lords is obvious in this regard. As it now stands, the Council is an absurdly large body, for Mr. Lang's successive additions to swamp opposition have completely ignored the old principle that it must never be as large as the lower House and that it should be considerably smaller, and a fresh batch of members had to be added to carry the new measure.

The Effect of Treaties on Law.—The Courts of Canada [2] have had occasion to deal with the effect on the law of Ontario of the Ashburton

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[1] *A.-G. for New South Wales* v. *Trethowan*, 48 T.L.R. 418. See *Journal of Comparative Legislation*, Third Series, vol. xiii, pt. iv, pp. 255, 256.

[2] *Arrow River and Tributaries Slide and Boom Co. Ltd., In re*, [1932] 2 D.L.R., 216.

Treaty provision that certain waters and portages shall be free and open to the use of the subjects and citizens of the two contracting parties, the United Kingdom and the United States. The legislature of Ontario imposed tolls for the use of improvements erected in the waters in question and naturally [1] it has been held that the Ontario legislation is valid even if it can be assumed to conflict with the treaty. The Ashburton Treaty was not confirmed by legislation so as to make it paramount law in Ontario ; if such legislation is now deemed requisite, it can be accorded by Dominion Act under s. 132 of the British North America Act, 1867. Though it is true that the decision in *Walker* v. *Baird* [2] does not formally cover the point, its warning to litigants is conclusive, for the British Government after it abandoned any attempt to establish the right claimed for it, that of interference with private rights on the score that their exercise was inconsistent with a *modus vivendi* with France to regulate the Newfoundland fisheries.

Newfoundland Constitutional Difficulties.—The operation of the normal principles of responsible government has always been difficult in Newfoundland owing to the small size of parties and the fact that there are no real grounds of political division other than personal ambitions and matters of administration of the resources of the Dominion. Hence a very difficult position for the Governor developed in February when Mr. Cashin, Minister of Finance, announced his resignation, giving as the reason the falsification of a minute of Council, and later made accusations against the Prime Minister and certain other persons. The leader of the opposition urged that a Select Committee should be set up to investigate Mr. Cashin's charges, but the government carried a request to the Governor to investigate the matter. On March 22 the Governor reported that there had been no discrepancy, no falsification and no irregularity. It is clear that the duty placed on the Governor was an undesirable one. It involved him in an investigation which he ought not to have been called upon to undertake, and which he should indeed have declined to undertake. It is an elementary principle insisted on at the outset of responsible government by Lord Elgin that a Governor must not place himself in a position in which he would have difficulty in working with the leaders of the opposition if they become his ministerial advisers. For the Governor to report unfavourably to his existing ministry was practically impossible, and it is not surprising that his report had no effect on public opinion, which manifested itself in April in the form of rioting of so severe a character that the Prime Minister temporarily had to remove himself from proximity to the capital. The Governor also found it necessary to ask for the presence of an imperial vessel to support the cause of law and order, and H.M.S. *Dragon* was sent to St. John's for the purpose. Clearly this action rendered it incumbent on the Governor to secure that no attempt was made to carry on the government by the use of imperial authority against the will of the people, and the Prime Minister was well advised to recommend the holding of a general election. No doubt this course offered in Newfoundland the best chance for success, as the government of the day is reckoned to have important advantages in any appeal. In fact, the result was a complete defeat, the Prime Minister losing his seat and his party being completely routed, two members only securing election. In August the Governor's intention to retire prematurely from his office on personal grounds was announced. Every sympathy must be felt with him in having to face so difficult a position, but it may be hoped that the error of accepting an unconstitutional commission will not be repeated.

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[1] See *Journal of Comparative Legislation*, Third Series, vol. vi, pt. iv, p. 201.

[2] [1892] A.C. 491.

The Cabinet Crisis in Rhodesia.—A rather amusing difficulty developed in Southern Rhodesia in May when it was felt by the Prime Minister that it was desirable to make a change in the head of the Agricultural Department in his ministry. The times have been difficult and the work of the department has been arduous, but in view of public feeling the suggestion was made by Mr. Moffat to the minister that he might facilitate matters by resignation. The minister, however, as is not rarely the case in South Africa, could not see his way to comply with the request, and the Prime Minister then determined to follow South African precedent and to rid himself of his difficult colleague by the plan of resignation of his office, which of course carries with it the retirement from office of the rest of the ministry. The Governor then, as usual, asked Mr. Moffat to form a new cabinet which he promptly did, excluding his unpopular colleague and incidentally saving money, for the Minister of Mines consented to assume also the portfolio of Agriculture. The Governor, of course, could have been advised to remove the minister from office, but the South African method, though perhaps rather cumbrous, has the merit of avoiding what might seem a drastic procedure. It ought not, however, to be necessary for such action to take place. The clear duty of a minister is to retire from office when asked so to do by the Prime Minister, and it is unlucky that this convention was not observed by the Minister for Agriculture, who since the change of government has announced his intention to resign from Parliament and to retire for a time from public life. Financial stringency is one of the causes which have induced the government to take up the issue of the mineral rights of the British South Africa Company which the Devonshire Agreement in 1923 recognized as valid, but which are impugned by the colonists. The colony has also been gratified by the decision to secure its representation at Ottawa, where it succeeded in securing agreements with the United Kingdom and Canada. No secret was made of the fact that the customs agreement with the Union was unpopular, and it is hoped that the Ottawa Conference may open up the way to securing freedom from it.

The Malta Royal Commission.—The report of the Commission is, on the whole, rather a disappointing document, and too apologetic in tone in its references to the efforts of the ministry of Mr. MacDonald to uphold the principle of non-interference by clerical influence in the elections. In recommending the restoration of responsible government, the Commission reiterated the belief that any new pastoral issued by the bishops would be of a different character from that of 1930 which forbade electors to vote for candidates who supported Lord Strickland, on pain of being refused the sacrament. On the strength of the report of the Commission the British Government announced in March 1932 the intention to restore the responsible government and to allow elections to be held, but on May 22 the Bishop of Malta sent a circular letter to all parish priests and superiors of religious communities in the diocese, confirming his pastoral letter of 1930 which was accordingly expounded in all the churches. In the circumstances the elections must have been postponed, and the British Government had evidently determined to refuse to allow them to proceed, though the Constitutional and the Labour parties represented their willingness to allow them to be held. But at this juncture it was announced that the Pope was pleased to accept the apologies of Lord Strickland, and that the pastoral of 1930 was therefore withdrawn, and the elections were duly held on June 11–13. The result was what was to be expected. The electorate naturally could not erase from its minds the instructions so recently given not to vóte for the opponents of the Nationalists, and the latter carried the day completely. It is impossible not to accord due respect to the manifestation of diplomatic skill on the part of the Vatican, for the procedure adopted ensured the victory of the Nationalists while terminating the tension between the Vatican and the British Government. But the settlement leaves still unsolved the vital question, which the Commission did not face, of the right of the Church in a British colony to use spiritual power to decide elections. The Commission seems to have forgotten that in the case of Canada the position was early defined by the Supreme Court[1] where Taschereau J., one of the most distinguished of French-Canadian judges and a loyal son of the Church, laid it down that threats of spiritual penalties made by priests with the approval of the candidate of the Conservative party afforded ground for invalidating the election. It does not appear clear that the Commission realizes that to admit of the use of such threats is a negation of civil law. The remedy no doubt is difficult, but it probably would have been best to allow an appeal to the Privy Council. In Canada the appeal to the Supreme Court secures the due administration of the law; in Malta it cannot seriously be asserted that the Court of Appeal is a tribunal of sufficient weight to be granted final power in these matters. The belief that what is applicable to the Dominions necessarily applies to Malta is inconsistent with the treatment of Malta in other regards and with the important changes which the British Government has carried out in the Constitution as the condition of restoring self-government.

The Malta Constitution Act, 1932.—The new Act endeavours to remedy the worst defects of the very faulty Constitution, granted by

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[1] *Brassard* v. *Langevin*, 1 S.C.R. 145.

Letters Patent in 1921. It validates a whole mass of legislation, the Letters Patent of 1928 and the subsequent Letters Patent and Order in Council of 1930–2, the legislation of the local legislature in 1929 and 1930, and the Ordinances of the Governor from 1930–2, thereby ending for good the trouble caused by the fact that the Letters Patent of 1928 were brought into operation through a vote of the legislature in which took part two members of the Council whose election was later held invalid by the Court of Appeal, and that the suspension of the Constitution was carried out in a way which, though probably legal, was complex and unsatisfactory.[1] It also takes away from the control of the government the issues of appointment and removal of judges, and the Governor may now remove on the ground of "proved misbehaviour or incapacity." The insertion of the term "proved" is clearly unwise; it is impossible to assign to it any satisfactory meaning, and it may easily give rise to litigation if the power should ever be used. The retiring age is fixed at sixty-five (with safeguards for existing officers), an interesting innovation and no doubt a wise one, for the state of legal procedure in Malta seems very unsatisfactory; greater youth in the judges may help to reforms. Another provision is also an innovation. It arises from the litigation as to the constitution of the Council and provides that, if a Bill receives the Governor's assent, it shall not be questioned in any legal proceedings commenced after the expiration of one year from the date on which the law comes into operation except on the ground that the law deals with a matter in respect of which the legislature of Malta has no power to make laws. The clause is not satisfactory. It omits the case where a Bill is reserved and later assented to by the King in Council, and it cannot safely be argued that this is covered by the words used. Indeed, it is obvious that the provision should have been merely applicable to any law assented to on behalf of His Majesty or by His Majesty. But this is not the only objection. The concluding words are so phrased that it may be argued that, if a subject falls within the sphere allocated to the legislature, a law made by it cannot be questioned on the ground of repugnancy after a year. This is not intended, but it should have been made clear that there is no attempt to cut down the effect of the Colonial Laws Validity Act, 1865. It would doubtless have been better had the clause merely provided that no Act assented to should be questioned either at all or after a year on the ground that either chamber of the legislature was not duly constituted or that the forms of procedure had not been duly observed. A further limitation on the powers of the responsible government is contained in the authority given to the Crown by Letters Patent to deprive the legislature of power to deal with the establishment, discipline, control and administration of the police, and to make the question a reserved matter over which the Governor will exercise full authority. Less importance attaches to the provisions regarding the selection of the Trade Union members of the upper House, whose constitution remains as anomalous as ever and wholly unsatisfactory, while nothing is done to clear up the dubious position of ministers when Parliament is dissolved.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xii, pt. iv, pp. 289–92.

Nationalist Demands.—Far more important than these changes is undoubtedly the step taken by the British Government to place education on a sounder basis.[1] The Commission found a very amazing state of affairs. In the elementary schools in the first two standards the children were taught English through the medium of Maltese and the results were fairly satisfactory. Under an Act of 1923—which violated the spirit if not the letter of the Constitution—children were compelled from the third standard to give their time equally to English and Italian. The results were deplorable; neither language was learned effectively, Maltese was not learned so that it could be read or written; it was difficult to obtain efficient teachers; many children, whose parents desired them to take the Dockyard examination, which does not include Italian, had to be sent to private schools; the system was expensive and contrary to the best expert opinion. Accordingly, the British Government took the only possible course of restricting the teaching of Italian to the secondary schools, thus giving the children an opportunity of learning their own mother tongue effectively and one world language, which will aid them in emigrating to British territory as well as in obtaining employment in the naval establishment. It is unfortunate that the action of the Government has been resented by the Nationalist Government, which has demanded the abrogation of the new provision, the surrender of control of the judiciary, the cancellation of the power to regard police as a reserved subject and the placing of the island under the Dominions Office as a sign of its higher status. These demands appear to have met with no sympathy from the Colonial Secretary, though pressed by the Premier and his colleagues, who, it is pleasant to note, have assured the public of their loyalty to the British Crown, on which some doubt seemed to be cast by the intemperate character of the attack on the British Government made in the local organ of the party on the appearance of the report of the Royal Commission despite its certainly generous treatment of the movement. It seems, however, that agitation to achieve the ends desired is to continue, and in particular it is asserted that the election turned largely on the question of language. It is clear that, if this were the case, the representation of the people must be singularly unsatisfactory, as the evidence is conclusive that the Maltese poorer classes much prefer their children to learn English, while the demand for Italian is the mark of a limited section of the people whose interests lie in development of cultural relations with Italy, but who evidently by their insistence on responsible government do not share the Italian preference of the doctrine of autocratic rule.

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[1] Provision is also made for securing criminal procedure to be carried on in English and Maltese in the case of persons familiar with these languages and not with Italian.

The Government of Ceylon.—It can hardly be said that the new form of administration in Ceylon has so far proved as satisfactory as was hoped. The Constitution might well have been worked by the Ceylonese as an experiment for a few years with the aim of discovering its real merits and defects, and it is to be regretted that from the first the aim of the legislators has largely been directed to attacking the elements of safeguard included in the Constitution. Very curiously the one principle which to outsiders seemed the most dubious has been the least assailed, namely, the system of government by committees. A motion that the system leads to divided responsibility, and delays in administration, and is unsuited for the government of the country, and that in lieu responsible government of the ordinary type should be adopted, failed to receive approval on July 20 by 36 votes to 6. Yet the committee system is one which can hardly be maintained if the other concessions desired by the legislature were conceded. In different words all these demands come to the same thing ; the reserved authority of the Governor in the administrative and legislative sphere and his wide control over legislation by the Council are denounced as inconsistent with the authority of the legislature. The right of the Crown to legislate by Order in Council is clearly regarded as wholly improper, and it seems that the one function of an independent character which the legislature would be ready to concede to the Governor is the prevention of the passing of legislation discriminating against communities or religions. If the demands made were conceded, it may very seriously be doubted whether the result would not be administrative chaos if the committee system were not laid aside. Moreover, the attitude of extreme demands made by the legislature prejudices dispassionate consideration of the issues, and it is unfortunate that the policy of Imperial preference was only agreed to by a vote of 24 to 20 after serious warnings by the Financial Secretary of the dangers of rejecting the project. The other matters in which friction has developed are hardly very suggestive of cool thought on the part of the legislature. It should not have been necessary for the Governor to have to use his reserved powers to secure the passage of a measure to exempt loans already issued from the operation of the new income-tax, and the demand that full power over the salaries of civil servants should be conceded was obviously contrary to the principle on which the Constitution was granted. Unfortunately such quarrels with the Government are easier than constructive legislation on the numerous social and economic issues which the previous legislatures could not effectively touch, and it would have been as surprising as gratifying if the legislature of Ceylon had preferred complex tasks to constitutional struggles.

The Indian Constitution.—The example of Ceylon does not suggest much comfort as regards the future Constitutions of the provinces and the central administration in India. Substantial further light has been thrown on the question by the issue of the reports on federal finance, on questions affecting the States, and on matters of franchise, by the small bodies of members of Parliament and experts who were sent to India to investigate the outstanding issues. These reports are of importance as showing the grave complexity of the questions arising, and the imperfect material available for their solution. The report on the States proves the amazing complexity of existing conditions, and the difficulties which arise from any attempt to fit the States into a federal system, which aims as an ideal on the identic treatment of every part, and the federalization of all control of customs. One point emerges clearly. While it will be open for each State to enter federation or not, it cannot object to the handing over to the central government of India of any tributes payable by it to the Crown, nor will this involve any loss of status or subjection to the central government. But the British Government clearly will not maintain a distinct establishment for the purpose of maintaining the position of the States. It is clear also that entry of the States into federation must bring them much more closely into contact with British India and indirectly this must affect their present system of government. But it is also clear that, whether the States enter federation or not, economic and fiscal considerations are inevitably driving them into constantly closer connexion with British India, so that federation may offer the most effective way of securing the interests of the States. From the point of view of the British Government, of course, the entry of the States is an essential feature of the system, for upon it rests the expectation of being able to construct a central legislature in which conservative views will predominate and security will be assured through the attitude of legislators rather than by external checks. Indeed, but for this policy, it is difficult to see how responsible government at the centre could have been contemplated.

Financial Relations.—The issue of financial relations will, it is certain, present grave difficulties. Federation will not reduce, but as elsewhere it will increase, expenses, and the grant of responsible government will encourage demands for expenditure on economic and social questions which cannot be met from existing sources of revenue. On the basis of the figures available the Committee could arrive at a surplus of 4,50 lakhs for the federation with a net military budget of 47,00 lakhs out of a total expenditure of 80,10 lakhs, but the United Provinces and the Punjab alone among the provinces may have surpluses of 25 and 30 lakhs respectively. Bengal heads the deficits with 2,00 lakhs, and the Committee naturally demand that by some means or other this must be reduced to something more within possibility. The Committee is pessimistic on the prospects of new taxation to yield any substantial amounts at an early date. They find only an excise on matches as immediately profitable, which might give 3 crores or 2½ crores for British India, and be added to the surplus already assumed of 4½ crores. An excise on tobacco, monopolies, other excises and the federalization of commercial stamps are dismissed as ineffective methods of raising money, and as sources of provincial revenue terminal taxes are deprecated ; tobacco taxes, succession duties and taxes on agricultural incomes offer possibilities of gradual increases of revenue. Very satisfactory is the finding that the federation can take over the whole of the existing debt without injustice, because the assets it will receive exceed in value the debt by a very large figure on the basis adopted by the Committee for calculating their value. Similarly the federation can accept liability for pensions without any effort to treat any part as a central as opposed to a federal liability, for the share of income-tax which the federal government will retain from what is paid in British India will exceed largely the amount due in respect of pensions which can be charged to British India only. With these items out of the way it is needless to complicate matters by differentiating between federal and central charges. The problem of treating income-tax has resulted in complex proposals. A gross total of 17,20 lakhs may be available, of which 13½ crores would be due to provincial collections as opposed to super-tax on companies, taxation of federal officers and of federal areas. All this could not be spared for the provinces, and the Committee suggests schemes of assignment of the sum which can be given which at most might be 7½ crores and may be only 5. It is made clear that there are no obvious sources of revenue whence the federation could aid either provinces or States, and that the difficulty of increasing revenue is not attributable to any question of the States.

Powers of Taxation.—The Committee follows in the main the existing lines as to powers, but it draws up definite lists of federal and provincial objects. In addition to purely federal objects, it gives the federation control over excises (except those on alcoholic liquors, narcotics (other than tobacco) and drugs), on the understanding that the federation would have the power to assign the proceeds in whole or part to the provinces, and it specifies certain taxes which would be levied by the federation for provincial benefit, subject to a right of surtax for federal ends. This category includes personal income-tax and capital tax not derived from land, taxes on mineral rights, and succession duties not connected with succession to land, as well as taxes on income or capital of corporate bodies. The last item would apply to the whole federation, the former to the provinces and other parts of British India. The units might be authorized to impose surcharges on these taxes for their own purposes.

Loans and Contributions in Emergency.—The issue of loans is complicated by the doctrine that the provinces and other units of the federation should have the right to raise loans in India on the security of their own revenues. This view of course is rendered difficult of application by the fact that in theory all Indian revenues are the security for the loans raised by the Secretary of State. It is proposed as a compromise that any unit which wishes to borrow independently must consult the federation, and that the federation can impose conditions on consent to such borrowing, in any case in which the unit is indebted to the federation. The federation must be, moreover, the sole authority to raise loans in the sense that no Inter-State Council can be given authority in this regard. Instead there should be set up an expert body of Loan Commissioners to whom all applications for loans from the federation made by the units shall be referred, and the same body will advise as to requests from units indebted to the federation for independent borrowing powers. The federation in emergency of political or economic character must have power to demand contributions from the units, which should normally be assessed on the revenue basis.

Immunity of Federal Property.—The Committee apparently were under the impression that the Canadian and Australian constitutional provisions as to immunity of federal property had proved simple to interpret, and recommend a like generality of enactment for India, though in the case of the units it suggests immunity only for lands and buildings as opposed to imported stores. This question, of course, has already been settled in the sense indicated in the Dominions.

The Communal Issue.—The most important step yet taken to bring nearer to accomplishment the necessary legislation is the decision of the British Government itself to lay down a basis of division of seats in the provincial legislatures among the contending parties. The procedure is recognized to be thoroughly undesirable, but the Prime Minister has defended it as inevitable in view of the inability of the parties to agree even to ask him to act as arbitrator. It is open therefore for every party to denounce the settlement, and the chief satisfaction of the government lies in the fact that it is so unpopular, to judge from formal protests, that it must at least have the merit of impartiality. In effect the Mahommedans are given the practical certainty of predominance, if very narrowly, both in Bengal and the Punjab with weightage in the rest of the provinces, and full control of the North-West Frontier Province, while, if it proves finally practicable to create Sind as an independent area, it will have a Mahommedan majority there. The Sikhs are refused the 30 per cent. of seats in the Punjab which they demanded on the plea of their preponderating share in the army of India, and the depressed classes were treated curiously. On the one hand, they were given, but for twenty years only, a number of separate seats, but they were also to vote in the general constituencies when qualified together with caste Hindus, who would thus, it was suggested,be given an incentive to persevere with their reputed intention of wiping out the present position of untouchability, which Mr. Gandhi has so often denounced as inconsistent with Hindu principles as opposed to practice. Since the decision Mr. Gandhi's dramatic fast has secured acceptance by the depressed classes of a compromise, eliminating separate electorates, but securing reservation of seats on a generous scale and selection of qualified candidates by the voters of these classes. Modest representation on a much-reduced scale from the present is given to Europeans, Anglo-Indians and Indian Christians. The principle of separate electorates thus laid down is clearly inevitable if the Constitution is ever to be inaugurated. Nor can any reasonable objection be taken to the separate representation of Labour, of the Universities, of Landowners, and of Commerce and Industry, Mining and Planting. The case of women is peculiar ; the most vocal spokeswomen on this head at the Round Table Conference denounced separate seats being allocated to them, but this has been done as the only way to have them present in the legislatures. It is, of course, hoped that the Mahommedan control of four provinces may serve to prevent unfair treatment of the Mahommedan minorities in the other provinces, and like considerations should secure Hindu interests against Mahommedan intransigence. The omission of any provision for proportionate representation in the federation is inevitable, for the number of members and the share of the States is yet undetermined, and until this is done there can be no basis of allocation of seats as between communities. But the fact illustrates what is obvious, namely, that there will be grave difficulty in securing the simultaneous operation of provincial and central responsibility. The view of the Indian delegates at the Round Table Conference when they rejected this possibility was manifestly unwise, and can only serve to postpone action. The most that can be expected is that the framework of the Constitution should embrace the scheme for federal responsibility, leaving the time of bringing it into operation to be decided under the conditions as they develop, especially the time when the major States desire to enter the system. This may not take place until the provincial system is well under way. In the meantime, unfortunately, a grave error on the part of the British Government, under which it was proposed to deviate from the procedure by way of conference, has caused serious irritation in India, but the mischief done has probably been retrieved by reversion, intimated in August by the Viceroy, to the mode of action promised. It is above all necessary to preserve Indian confidence in the good faith of the administration, and it was clearly a mistake, even in the hope of saving time, to neglect the difficult but necessary path of co-operation.

British Commercial Interests in India.—Most unfortunately a grave surrender of the position of the British commercial community in India was made by the Chairman of the Conference on its close.[1] The rights stipulated for British subjects resident in India were, according to the carefully considered report, to be granted also to companies registered in the United Kingdom, but on the request of Sir Purshotamdas Thakurdas, the leader of the interests opposed to European commercial predominance in India, the protection was declared only to apply to companies registered in India.[2] This is, of course, completely to surrender a most important principle, and it can hardly be supposed that the British Government did it otherwise than by inadvertence. But to right this error will clearly expose the Government to attack in India, and the episode is suggestive of the unwisdom of changes of carefully agreed reports made verbally at the last moment without the assent of the parties to the discussion summed up in the report. Taken in conjunction with the large diminution of the relative strength of Europeans in the legislatures as proposed by the Government, it serves no doubt as a clear intimation that European commerce will not secure adequate protection under the new Constitution, save in so far as it proves possible to construct with the aid of the States a federal legislature in which by union with the representatives of the States the European representatives may be able to protect their interests. This and other considerations show how very different responsible government in India must be from the Dominion or British model, where the lower Houses of the legislatures are elected on adult suffrage and communal reservations are unknown. The new system will present far greater difficulties in working than is evidently realized by its supporters.

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[1] *Journal of Comparative Legislation*, Third Series, vol. xiv, pt. i, pp. 121–3.

[2] Cmd. 3997, pp. 122, 123.

The Separation of Burma.—The Burma Round Table Conference proved very disappointing in that it revealed the Burmese majority united in a policy of bare negation of readiness to provide due safeguards for minority rights. Finally, the British Government had to take decisive steps by announcing that, if Burma desired separation and so decided by a general election, it could have it, subject to necessary safeguards. The Constitution offered is generous, for it provides for responsible government with only necessary reservations. These include defence and external affairs, and the Shan Federated States and other excluded areas, and in respect of his responsibilities in these matters the Governor will have legislative powers and control of finance. From the field of finance exchange, currency and coinage will be reserved and the funds necessary for the service of loans will not be voted but placed as a standing charge on the territory. The Governor must also have power to prevent serious injury to the financial stability of the country, to safeguard the interests of officers engaged under the authority of the Secretary of State, to secure the peace and tranquillity of any part of the territory, to prevent serious prejudice to the interests of any section of the population, and to protect imperial interests. Further, the regime of equal rights for any British subject resident or carrying on business in Burma is to be laid down, a provision which is manifestly not satisfactory as it does not apply to British companies, and it covers Dominion British subjects even where no similar rights are accorded to Burmese when in their territories. It is clear that the Governor will have a grave burden to bear, and, in view of his wide powers and the reserved subjects, responsible government in Burma must necessarily be something very different from the system as worked in any British colony. But the comparative simplicity of the situation and the fact that despite safeguards for minority representation Burmans must control the legislature may make it practicable to secure something more like the normal functioning of ministerial control.

NOTES.

Short Cuts in Legislation.—During the war, when many things were possible, the Parliament of the United Kingdom placed upon the statute-book a lengthy Act which had never been preliminarily printed as a Bill, had never been discussed in debate, was never presented for the Royal Assent, and never received a chapter number in the series of Acts of the session. The Air Force was constituted in 1917 as an independent arm. To provide for its government and discipline Parliament compendiously enacted (7 & 8 Geo. V, c. 51, s. 12) that the Army Act should apply to the Air Force with such necessary adaptations as the substitution of " airman " for " soldier," " Air Council " for " Army Council " and so on. The Act was to be printed as thus adapted and was to be called the Air Force Act. It was an ingenious short cut. Now, after a lapse of fifteen years, another short cut has been taken in connexion with the duplicate application of enactments to England and Scotland.

Only the simplest statutes can be enacted in identical terms for the two countries. Obvious differences of structure and vocabulary are soon encountered. *London Gazette* must of course be *Edinburgh Gazette* for Scotland ; " county court " must become " sheriff court " ; " arbitrator " should be " arbiter," and so forth. The draftsman can, in straightforward cases, manage these equivalents with a very few words as he goes along. If, however, the proposed law is complicated, separate Acts had better be passed for England and Scotland, because divergences of policy and administrative machinery and function make it difficult to present two complete pictures on a single canvas. Between the simple and the complicated instances comes a large class of statutes where (as in the Children Act of 1908, for example) Parliament can frame a single Act in language primarily suited to English conditions and can add a Scottish application clause with a list of the Scottish equivalents to be substituted. The latest use of the short cut in legislation develops the Scottish application clause so as to provide a separate Act for Scotland without the pother of passing it through Parliament. The recently passed Children and Young Persons Act and Town and Country Planning Act (22 & 23 Geo. V, cc. 46 and 48) are framed *prima facie* for England. Then comes a Scottish application section of a novel kind. The formula is alike in each Act ; the following is the language of the Children and Young Persons Act (c. 46, s. 89) :

> (1) This Act shall apply to Scotland subject to the adaptations and modifications specified in the Fifth Schedule to this Act.

This schedule of adaptations and modifications is nearly twenty pages long. The differences, therefore, between the law for England and the law for Scotland are so substantial that Parliament might ordinarily have been moved to pass separate statutes for the two countries. So far, however, the method is common form though the instance is on a big scale. Now comes the novelty.

> (2) A copy of this Act as applying to Scotland by virtue of the provisions of the last preceding subsection, but with this section and the said Fifth Schedule omitted therefrom, shall be prepared and certified by the Clerk of the Parliaments as if it were a separate Act which had received the Royal Assent on the same day as this Act and shall be deposited with the Rolls of Parliament, and thereupon this Act shall cease to apply to Scotland and the Act as certified as aforesaid shall take effect as a separate Act of the present session and may be cited as the Children and Young Persons (Scotland) Act, 1932, and may be printed as a separate Act by the Printers to His Majesty as a chapter of the statutes of the session distinguished by the number next following the number of the chapter assigned to this Act.

Thus after chapters 46 (the Children and Young Persons Act, 1932) and 48 (the Town and Country Planning Act, 1932) there are respectively added to the statute-book, without further effort by Parliament, chapters 47 (the Children and Young Persons (Scotland) Act, 1932) and 49 (the Town and Country Planning (Scotland) Act, 1932). Those who have to understand and administer the law in Scotland obtain the advantage of having a separate Act, a clean print without the trouble of decoding the English expressions. Those who arrange our Parliamentary programmes have managed to economize time and effort by killing two birds with one stone. The Air Force Act precedent is improved upon because the new synthetic statutes can at least be cited by a chapter number. It may be added that the Schedule of specified variants include a general authority to substitute singular words for plural and so forth as required and to make any consequential re-numbering of sections, subsections and paragraphs which the specific modifications may involve. The Schedule is elaborated with care and success. Perhaps the words "solicitors and counsel" (c. 47, s. 3 (2) (*b*)) would not have appeared in a measure framed solely by a Scottish draftsman from the beginning; but these anglicisms will hardly defy construction north of the Tweed.

So much for the new short cut as a technical precedent, a development of the printing-clause familiar in the Naval Discipline Act, the Army Act, the Government of India Act, the Patents and Designs Act and other statutes. It has, of course, a wider significance. Lord Ullswater, challenging the novel formula during a House of Lords debate, suggested that it was devised to evade the criticisms which the Scottish Committee of the House of Commons is able to offer upon the purely Scottish Bills which are normally referred to its valuable deliberations. Advocates, indeed, of a Parliament in Edinburgh may well use the incident as proof of the inadequate consideration of Scottish interests at Westminster. Lord Atkin, in the same debate, described the formula as a constitutional innovation which was completely wrong in principle. The clause directed the Clerk of the Parliaments to prepare and certify a document which was not in fact an Act of Parliament, no matter what attributes the clause ascribed to it. The formula declares that, after the document is certified, the enabling Act shall no longer apply to Scotland. " The only thing Scotland will have is a document certified by the Clerk of the Parliaments, and that, I think, is entirely wrong. . . . Any law should have the full assent of both Houses of Parliament and the Royal Assent, and that this document will not have and cannot have."

The New British Empire.—For all citizens of the British Empire who are perplexed with the complexity of the problems confronting them at the present time Professor Elliott of Harvard University provides a valuable and constructive survey of the present conditions in *The New British Empire.*[1] His ingenious use of the Lion and the Unicorn as representing respectively the Empire under the former dominant control and the new diversity arising from the changed status of the constituent parts is an example of some originality of thought combined with an appreciation of the sterling importance of the maintenance of the position of the British Empire to the welfare of the whole world. In particular Professor Elliott realizes that the Empire is the greatest bulwark to international peace as opposed to the disintegrating forces of Soviet Russia. The detailed exposition of this proposition which recurs throughout his lectures shows the extent to which the Bolshevist regime is influencing not only European conditions, but also the Dominions and countries in which English influence is their chief security for ordered government. It is a conflict of ideals. Professor Elliott, as a keen observer, is convinced that the British peoples with an ordered freedom which has shown the way even to the democratic liberty of the United States, will so be able to modify their procedure and relationships as to build up a future for the whole civilization. " British democracy," he writes, " is pioneering in the effort to reconcile social control and rational planning with the flexible play of economic forces and the retention of individual initiative." The whole Empire is passing through a time of difficulty. " The chastening of adversity is harsh but salutary." There are signs already that such discipline is calling forth, as it has done before, all that is best in the British peoples. In the long run, as Professor Elliott recognizes, it is not economic alliances nor constitutional relationships which form the deciding factor. " The poised Athenian way of life and the stoic Roman virtues of public service for which British tradition stands are a precious heritage to her Dominions. It will be this trust to support and preserve in other lands, too, the spirit of English liberty and English justice that still keeps firmly alive their attachment to the Mother Country. It is for the statesmen of the Dominions, too, and the whole people of the New Empire to prove equal to their task: world peace, the collaboration of classes in industrial prosperity, the reconciliation of trusteeship with colonial rule, of nationalism with international co-operation, and of democracy with strong leadership and economically efficient government. The labours are Herculean, and none but the most dogged courage, imbued with the pride of empire and the strength of a great race, could face them unappalled. Strength to those arms, wisdom to those heads, courage to those hearts who would, in the words of William Blake's beautiful song:

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[1] London: McGraw-Hill Publishing Co. Pp. xv + 519. Price 25*s*.

> ' . . . build Jerusalem
> In England's green and pleasant land.'

To that fair city, inasmuch as it is not made with hands alone, all men may look for courage and new faith." So Professor Elliott concludes a volume for which he deserves the thanks of the British peoples.

Linthicum Foundation Prize.—The Faculty of Law of Northwestern University administering the income of The Charles Clarence Linthicum Foundation announces that the sum of one thousand dollars and a bronze medal, as a first prize, and five sums of one hundred dollars each, as second prizes with honourable mention, will be awarded to the authors of the best monographs submitted by December 1, 1933, on the following subject: "Negotiable Instruments in their International Relations"—a comprehensive study of the diversities of commercial practice and national laws in this field and of the present situation of the movement for international uniformity. For further particulars application should be made to the Dean of the Faculty of Law, Northwestern University Law School, 357 East Chicago Avenue, Chicago, Illinois.

The Irish Hospitals' Sweepstake.—The success of the Irish Hospitals' Sweepstake is rapidly creating a situation in Great Britain similar to that which exists under Prohibition in the United States. The action of the Customs and Post Office in confiscating tickets and prosecuting the possessors stimulates otherwise law-abiding citizens to endeavour to obtain them. The consequent weakening of the Englishman's regard for law and order which has been the admiration of other nations, especially during the General Strike in 1926, thus becomes a menace to the national welfare as serious as any danger inherent in the approval by the State of the existence of the sweepstake. Mr. C. l'Estrange Ewen provides other reasons in his admirable survey of the historical, legal and ethical aspects of Lotteries and Sweepstakes[1] for advocating the introduction by the government of a modified scheme of lotteries clearing away all anomalies, inequities and preferences. Whether his view

[1] London: Heath Cranston. Pp. 403. Price 15*s*.

be adopted or not, the material which he has collected gives a comprehensive mass of information necessary to anyone concerned with this difficult subject. He shows that lotteries were prohibited in some foreign countries even before they were introduced into England in the middle of the sixteenth century. The mass of legislation at one time authorizing and later suppressing lotteries is set forth in detail by the learned author, who gives either the text or a full summary of the Acts. As he includes Scottish and Irish legislation, he might have carried his research one step farther and added the legislation in different parts of the Empire, especially the Acts which were carried into Australia and, in some of the States, allowed to remain in operation after their repeal in England. The one thing remaining legal in England is the Art Union, which, even under the carefully drawn rules of the Board of Trade, can still be used as a form of lottery. Art Unions, however, do not seem to have been devoted to the benefit of charities in England to the same extent as they have in New South Wales, though recent advices suggest that financial conditions in Australia have operated against the success of anything of the kind in Tasmania as well as in New South Wales. The competition of the Irish Hospitals' Sweepstake has reduced the Calcutta Sweepstake to a small proportion of its former size. That is only one of the ways in which its continued enormous success is having repercussions throughout the Empire. The policy of attempted repression is being continued in England pending the Report of the Royal Commission which is dealing with the whole subject. In the meantime all who are concerned with the legal aspects have cause to be thankful to Mr. L'Estrange Ewen for his reliable survey of the law with its full references to decided cases as well as statutes.

The Annual Register.—There is no publication so useful as a record of public events as the *Annual Register*,[1] which has been published regularly since the year 1758. The first portion consists of an account of the political history of Great Britain. Foreign countries, the Dominions and the Indian Empire receive similar attention, while a chapter is devoted to the League of Nations. Another section contains a useful chronological summary of the principal events of the year. Separate surveys of literature, science and art, finance and commerce, and law constitute another portion of the volume. The last includes important judicial changes and events of importance to lawyers and the general public such as the attention given in 1930 to the cost of litigation. The important Acts of the session are summarized, and the points of the principal legal decisions of the year set forth with an admirable succinctness. Before giving the obituary of the year, there is a section devoted to public documents which is singularly useful. In 1930 it contained M. Briand's Memorandum on the organization of a Regime of European Federal Union, with the replies received to it by the French Government. In

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[1] London: Longmans, Green & Co. 30*s*. annually.

1931 the " Public Document " was a translation of the Constitution of the Spanish Republic. The Acts of that year included a summary of the Statute of Westminster which was more fully explained in the Political History section. It is possible to criticize the volumes in detail according to the interests of the reader, but the balance and accuracy are excellent. As a reliable work of reference the *Annual Register* has no equal within such a useful compass.

Proceedings of the Canadian Bar Association, 1931.[1]—This volume contains much interesting matter. Attention may be drawn particularly to the address by Sir Lynden Macassey reviewing English legislation so far as it has interfered with industry. Useful work in bringing about uniformity of legislation is being done by the Commissioners appointed to draft uniform laws.

[1] Toronto : The Carswell Co.

NOTICES OF BOOKS.

BENTHAM'S THEORY OF LEGISLATION.[1]

WHETHER there is a demand for a reissue of the " Blue Bentham "—*i.e.* the curious Bentham-Dumont-Hildreth production familiar to many generations of Oxford and Cambridge students—is a question for the publishers. Bentham is still a legend ; though the interest taken in it is, probably, much less than it was half a century ago. Our whole outlook on society has changed. Bentham, though he may not have known it, was a child, no less than a tutor, of the French Revolution. To him, as to his contemporary, Jean-Jacques Rousseau, a political society was a collection of individuals, each struggling with the rest to attain his share of a somewhat vague ideal called " happiness " ; and the business of government was simply to see that everyone had a fair chance in the struggle. The old order had been based on authority ; the new was to be based on liberty. Reason was the sole test of virtue in laws and institutions. It was assumed that, left to himself, each individual would steadily pursue his own interests, mostly of a material character.

It is a different world from ours. We stand aghast at some of the dogmas which, to the reformers of the late eighteenth and early nineteenth centuries, appeared to be truisms. The first sentence of Rousseau's *Contrat Social* is a good example. " Man is everywhere born free ; we find him everywhere in chains." To most of us, the new-born child, dependent upon others for his very existence, and liable, at any rate for the first few years of his life, to be disposed of at the will of his parents or guardians, appears to be far more slave than free ; while the adult at least has some chance of freedom. Bentham's equally sweeping generalization : " Man, from the very constitution of his nature, prefers his own happiness to that of all other sensitive beings put together : but for this self-preference, the species could not have had existence," [2] seems to us to be a confusion between happiness and survival (by no means necessarily co-existent), as well as a libel on human nature. And, though we have no desire to deprive Mr. Ogden (p. xxix) of his preference for Bentham over Marx, we feel that Duguit has gone deeper in his study of the social organism than did Bentham. For the modern reformer—theorist and statesman alike—has inevitably come to look upon a nation not as a collection of isolated individuals, but as a social organism, organized, that is, into an infinite number of more or less closely connected groups, whose interaction generates the flow of social life.

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[1] *The Theory of Legislation.* By Jeremy Bentham. Edited with an Introduction and Notes by C. K. Ogden. (International Library of Psychology, Philosophy and Scientific Method.) (London : Kegan Paul, Trench, Trübner & Co., Ltd., 1931.) Pp. li + 555. Price 7*s.* 6*d.*

[2] Quoted by Mr. Ogden (p. xxix) from *Works*, vol. x, pp. 80–1.

In fact, John Stuart Mill, who can hardly be suspected of prejudice against Bentham, summed up the defects of Bentham's philosophy in his judgment, that it "will do nothing for the conduct of the individual beyond prescribing some of the more obvious dictates of worldly prudence and outward probity and beneficence." Bentham attained manhood at a time when the violent changes in the body politic occasioned by the transition from predominantly agricultural to predominantly industrial conditions had cast up a whole heap of outworn laws and institutions, which clamoured for destruction; and Bentham, gifted with shrewd common sense and great vigour of expression, led a charge against them which ultimately swept most of them away. But, this work done, his mission was accomplished. A reformer who ostentatiously despised the study of history[1] was not likely to produce a constructive scheme for the reorganization of an ancient community which had undergone a revolutionary change.

Mr. Ogden's *Introduction* contains a useful account of the process by which the *Theory of Legislation* assumed its present form; and he has had the advantage of consulting unpublished correspondence between Bentham and Dumont, Bentham's editor. But his pages are not free from inaccuracies. Grand juries, in spite of Bentham's attacks and a suspension during the World War, have not been "abolished" in England,[2] as frequent accounts in *The Times* might have warned him. Doubtless their abolition has been suggested by critics whose arguments are entitled to respect; but they are defended by other critics equally respectable. It is a pity that, in order to justify Bentham's description of Blackstone as an "enemy of all (law) reform," Mr. Ogden should have adduced (p. 514) the testimony of the youthful Mill in a purely academic exercise composed at the age of nineteen. We have always regretted the publication of that *jeu d'esprit* in *Economica,* as unfair to the memory of Mill himself, and still more unfair in the innuendo which it implies. That there is a conservative element commonly to be found in the successful members of any profession may be admitted. But it is not confined to the legal profession; and it is ridiculous to imply that there have been no reforming lawyers. It would be truer to say that the great bulk of the vast legal reforms of the nineteenth century was the work of lawyers. But law reform, to be really valuable, must be based on a sound and scientific study of social organization; and it is just this, unfortunately, which Bentham has not given us.

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[1] "What is history, but a collection of the absurdest animosities, the most useless persecutions?" (*Principles of Legislation*, chap. iii, s. 1.)

[2] *Introduction*, p. ix.

We must, however, express our gratitude for the reproduction in this volume of an excellent portrait of Bentham, in the prime of life, preserved in University College, London, and for some personal details of the life of the original, which show him, in some respects, to have been more attractive as a man than as a philosopher. As is well known, Bentham enjoys a physical immortality rare in non-royal personages; for his embalmed body can still be seen at the same institution.

EDWARD JENKS.

MANU AND YĀJÑAVALKYA.[1]

IN the absence of any chronology to determine the dates of the various ancient texts which have provided the material for research it has proved impossible to describe with certainty the history and development of the personal Hindu law as administered at the present day, and most of our knowledge of it is based upon conjecture.

The accepted theory, derived chiefly from the writings of Maine, is that Hindu Law in its origin is pure customary law which, under the influence of Brahminism, was moulded into a system of sacred law purporting to have been divinely inspired and to possess divine authority.

While the art of writing was still undiscovered, the knowledge of the customary rules of conduct was confined to the Brahmins, the priestly class, who, as the sages of early society, were the custodians and interpreters of the Vedas or Hindu scriptures. Their knowledge and principles of interpretation were, it is supposed, transmitted orally from one generation to another by means of Sūtras or aphorisms, maxims of law, morality and religion which served the purpose of a *memoria technica* and which are known to have been reduced to writing at a very early date. Many of these Sūtras have been edited and translated by Sanskrit scholars and form no inconsiderable portion of the material from which our knowledge of the Hindu Law has been drawn.

The privileged position of the Brahmins in early Hindu society enabled them, through the process of interpretation, to exert great influence in the fashioning of the law which was exclusively known to them. They were the only learned men of their times and, by virtue of their learning, occupied a predominant position both as ministers and kings. Their political ascendancy afforded them an opportunity of impressing the law with a strong religious bias, and it is not surprising therefore to find that the Code of Manu, hitherto regarded as the first systematic collection of the rules of Hindu Law, is saturated with Brahminism.

This Code, as Maine observes, is not to be regarded as embodying any rules of conduct actually observed and applied in practice. It contains rather an exposition of *Dharma* or sacred law—a set of precepts which the priesthood considered proper to be obeyed.

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[1] *Manu and Yājñavalkya, a Comparison and a Contrast: A Treatise on the Basic Hindu Law.* By K. P. Jayaswal, M.A. (Oxon.), of Lincoln's Inn, Esquire, Barrister-at-Law. (Calcutta: Butterworth & Co. (India) Ltd., 1930.) Pp. xxiv + 331.

The Code of Manu was followed about a couple of centuries later by the Code of Yājñavalkya, of whom nothing is known. Some scholars incline to the belief that this work, like its predecessor, was derived from earlier Sūtras, but of these no trace has been found and the better opinion seems to be that the Code of Yājñavalkya is in fact a liberalized revision of the Code of Manu which, while it retains to a large extent the orthodoxy of the earlier work, tempers down its austerity and rigidity. It is, so to speak, a more humane and practical code containing much of what is pure secular law : it places the Brahmin under the law and not above it.

The importance of Yājñavalkya's Code lies in the fact that it furnished the groundwork for the celebrated commentary known as the Mitākshara written by Vijñāneswara about the eleventh century A.D.

It is this commentary which gave rise to the Mitākshara school of law which now governs the greater part of India. In Bengal it has been superseded in some respects by the Dāyabhāga, a Brahmin code of much later date, while in Bombay the authority of a local commentary, the Viyavahāra Mayūkha, prevails as regards those matters in which it is in conflict with the Mitākshara.

These commentaries settled the usage and interpretation for the provinces in which they were respectively recognized and, as declared by the Privy Council, must now be treated as being of supreme authority ; it is no longer permissible for the courts in India to resort to the Codes and to interpret them otherwise than in accordance with the commentaries.

The book here under review embodies the Tagore Law Lectures delivered by the author in the University of Calcutta in 1919, his subject being " The Codes of Manu and Yājñavalkya, a Comparison and a Contrast." The author claims to have brought under survey the entire body of Hindu Law and he has certainly put forward new matter and raised questions regarding the true origin of Hindu Law which merit serious consideration. He challenges the views hitherto taken of the Codes of Manu and Yājñavalkya and advances the theory that both of them are derived from an earlier code known as the Artha-Sāstra and ascribed to Kautilya, another name for Chānakya who is known to have been the minister of Chandragupta, the first of the Maurya dynasty, who established himself as king in or about the year 322 B.C.

The Artha-Sāstra was discovered in 1905 and was edited and published in 1909 by Pandit Shāma Sāstri, the librarian of the Government Oriental Library in Mysore, who has since published a translation of it in English.

The discovery of this code is an event of great historical importance which has attracted the attention of the most eminent Sanskrit scholars of our time. The Artha-Sāstra does not pretend to be an original work.

It is described in the opening chapter as being "a compendium of all those Artha-Sāstras which, as a guidance to kings in acquiring and maintaining the earth, have been written by ancient teachers." It is a veritable encyclopædia of the science of polity, containing elaborate and precise instruction on such subjects as discipline, the conduct of courtiers, the source of sovereign states, the art of war and the conduct of corporations or guilds. The Fourteenth Book, entitled "Secret Means," is devoted to sorcery and magic and contains a long list of spells, poisons and remedies which are recommended as having their uses in the practice of statecraft.

It is the Third Book of the Code, the "*Dharmasthīyam*," which presents what is of most interest to the lawyer. Here we find set out in astonishing detail a complete system of both substantive and adjective law designed for the guidance of the judges of the royal courts, which anticipates in many respects the most modern legislation. As pointed out by Mr. Jayaswal, the law so laid down is real secular law; it is the law made by the king and binds all subjects, Brahmins and others alike, and it is expressly declared that in cases of conflict the royal commands must prevail over the *Dharma* or sacred law. The Artha-Sāstra is, in truth, an amazing compilation and its author, whoever he was, must have been the Machiavelli of his age.

If, as is contended in the book now under notice, this Artha-Sāstra of Kautilya was in existence in the year 300 B.C. it must be of earlier date than the Code of Manu which has come down to us and to which no period prior to the second century B.C. has been assigned. This fact would dispose of one assumption hitherto made, viz. that there was no known work on political subjects produced before the time of Manu. On the contrary, we should have to conclude that long before his code appeared the secular law in India had reached a pitch of astonishing perfection and consequently we might well be tempted to agree with Mr. Jayaswal's judgment that the Codes of Manu and Yājñavalkya are nothing more than Brahminized versions of Kautilya's Code which was known to both those authors. His theory is that the works of Manu and Yājñavalkya came into being at the period when Brahminism was triumphant after the collapse of the Mauryan empire and that they represent a conscious and deliberate attempt to restore the reign of *Dharma*—the sacred law—which had been superseded under the influence of the Buddhist doctrines which had spread during the era of the Maurya kings. The learned author seeks to refute the opinion that the Codes of Manu and Yājñavalkya were derived from earlier Sūtras; he maintains that both are to be traced to this Artha-Sāstra code. On such a view of their origin both codes must necessarily lose the sanctity and pride of place which they have hitherto enjoyed in the opinions of Hindu writers.

The question is whether, on the basis of what we know of this recently discovered work, we should be justified in yielding assent to this thesis propounded with so much confidence. The validity of the arguments by which it is supported depends obviously upon the chronology which the author has adopted; he appears to entertain no doubt that this Artha-Sāstra of Kautilya was the work of Chandragupta's chief minister and that it must therefore have been produced not later than 300 B.C.

It is not to be denied that in this matter Mr. Jayaswal has the support of some learned Sanskrit scholars. On the other hand, he is contradicted by other scholars of no mean authority who maintain that the Artha-Sāstra cannot be of a date much anterior to A.D. 300, and that although attributed to the minister Chānakya, it cannot in fact be his work. It is argued by them, in the first place, that the Artha-Sāstra portrays a far more advanced and complicated type of society than that described by Megasthenes, who is known to have been an envoy to the court of Chandragupta about 300. B.C. In the second place they contend that the declaration in the text itself that the code is the work of Kautilya is not conclusive to show that it is the product of any particular individual whom we can identify with the minister Chānakya. It is true that he was also known by that name, but the word "Kautilya" merely signifies "a crafty or cunning person," a description which might well apply to many others as well as to Chandragupta's celebrated adviser. It is by no means uncommon to find treatises of this kind ascribed fictitiously to some worthy of a long-past era whose reputation as a statesman or administrator had led to his being regarded by later generations as a monument of political wisdom. Some other scholars, while cautiously admitting that the matter of this Code may be of considerably earlier date, are definitely of opinion that the Code itself could not possibly have been produced as early as 300 B.C.; they would fix its appearance at some time in the first century B.C.

In this state of expert opinion it would be difficult to hold that the learned author has succeeded in establishing the thesis which he has propounded with great earnestness and ability; it would seem more expedient to suspend judgment until we have forthcoming more convincing evidence that his chronology is correct.

It is, indeed, fair to say that his theory of the early origin of this Artha-Sāstra Code cannot be rejected off-hand on the *a priori* ground that a highly developed system of law such as it exhibits could not have been in force as early as 300 B.C. The discovery of the Babylonian Code of Hammurabi, which has shed a flood of new light on the history of written law, shows that a comprehensive body of secular law, no less precise and practical than this Code of Kautilya, was in existence at least two thousand years B.C.

On the other hand, it is hard to believe that the Code of Manu and the Code of Yājñavalkya could have secured general acceptance by the early commentators and have been regarded by them as the ultimate sources of the Hindu Law if, as Mr. Jayaswal argues, they represent nothing more than a calculated effort to oust a perfect and widely observed secular code in order to restore the lost dominion of the sacerdotal law of an earlier age.

Modern jurists seem to agree that the normal process of evolution is from the religious to the secular law, a transition from *Fas* to *Jus*, and if this theory is correct it appears unlikely that the compiler of Manu's Code could have successfully foisted upon the world a body of religious law purporting to emanate from a divinely inspired lawgiver, and could thereby have supplanted this Code of Kautilya, a collection of positive laws prescribed by an earthly ruler whose edicts are declared expressly to possess an authority superior to that of the divine commands of the *Dharma* or sacred law.

B. L.

LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE.[1]

DR. ALLEN, who last year resigned the Chair of Jurisprudence at Oxford after an all too brief tenure, to take up the responsible duties of Warden of Rhodes House and Oxford Secretary to the Rhodes Trustees, has here collected ten lectures and essays dating from 1924 to 1931. They are all marked by that felicity of style and clarity of thought that Dr. Allen's *Law in the Making* has led us to expect from him.

Every writer on Jurisprudence at some time inquires " What is Jurisprudence ? " Dr. Allen does this in his first essay, but further asks " and Why ? " In the result he seems to approach the position of the Analytical School—though he objects to the name. " The task of Jurisprudence is to abstract and systematize the essential principles of law, without reference to their goodness or badness "—getting help where it can from history, ethics and metaphysics. " Status and Capacity," Dr. Allen's inaugural lecture as Professor of Jurisprudence at Oxford, contains a critical examination of the views of various writers, English and foreign, as to these conceptions, followed by a full and informing discussion of their meaning in Private International Law with special reference to English cases.

Some of the other essays are lighter in construction and content. " The Judge as Man of the World " asks what, if anything, a judge is allowed to know outside the evidence and " as man of the world " ? After examining three recent libel cases and in particular the much-litigated dispute between an amateur golfer and a firm of chocolate makers, Dr. Allen seems to think that the " Who is Connie Gilchrist ? " type of judicial ignorance is out of date. Under the title of " The Phlegmatic Englishman in the Common Law " the behaviour expected by the law from " the reasonable man " and the qualities attributed to him are considered in the light of various decisions. " The Young Bentham " gives a bright account of Bentham's various attacks on the *Commentaries* of Blackstone, whose lectures Bentham heard as a precocious undergraduate of Queen's, at once, as he says, detecting their fallacies. "Legal Morality and the *jus abutendi*" starts with a consideration of the *Mogul Steamship Co.* v. *McGregor Son & Co.*, [1892] A.C. 25, and more recent decisions along the same line, and goes on to a plea for a closer approximation between law and morality in the Law of Tort—in particular the discarding of the doctrine enshrined in many cases that the exercise of a legally recognized right is protected, whatever the motive and whatever the damage caused to others.

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[1] *Legal Duties and other Essays in Jurisprudence.* By Carleton Kemp Allen. (London : Humphrey Milford, Oxford University Press.) Pp. xvi + 318. Price 15*s*. net.

The two last essays have reference to Criminal Law and particularly English Criminal Law. "The Nature of a Crime" begins with an examination of the historical and formal differences between crime and tort, which, while not breaking new ground, surveys the old satisfactorily. The latter part suggests a classification of crimes in English law on the basis of a main division into Public and Private Offences. "There are some offences which *primarily* injure specific persons or their rights and *secondarily* injure the public interest, while there are others which *directly* injure the public interest represented by various factors of social organization, and do not injure specific individuals at all except in the very remote and indeterminable sense that ultimately every individual is a joint beneficiary in the public interest." In an Appendix, the preparation of which must have involved considerable labour, with, perhaps, hardly adequate results, Indictable Offences in English Law are set out under the two heads of Public and Private Offences with various subdivisions. Of 331 Indictable Offences, 128 are classed as Private Offences and 203 as Public Offences. The distinction is in some cases hard to draw, but why are Rape and Indecent Assault "Private Offences" while Defilement of Children, Incest, Procuration and a number of similar crimes are "Public Offences"?

The other Criminal Law topic dealt with is "The Presumption of Innocence," which is shown to be far from characteristic of English Criminal Law, until the nineteenth century. Its establishment as a principle of our law was due partly to the changes in social organization, so that society, having less to fear from criminals, could treat accused persons more fairly, partly to the development of the law of evidence. But surely Dr. Allen has overlooked some cases and *dicta* earlier than *R.* v. *White*, 4 F. and F 363, on which he relies when he says that "the presumption of innocence as it is now understood came to maturity in 1865." And the *dicta* of Lush J. in *Hurst* v. *Evans*, [1917] 1 K.B. 352, on the relation between civil and criminal evidence, apparently accepted by Dr. Allen (p. 287, n. 1), were directly challenged by Bailhache J. in *Munro Brice* v. *War Risks Association*, [1918] 2 K.B. at p. 87, and indirectly by other judges.

Of the more definitely scientific essays, that on the well-worn topic of "Legal Duties" is the longest and most important. Are rights and duties the constant, coexistent and interdependent subject-matter of law?

The conclusion of Duguit that "nobody possesses any right except the right of always doing his duty" is examined and rejected, as also is that of Professor Lundstedt of Upsala, less known in this country, that the conceptions both of subjective right and subjective duty are unnecessary and contrary to facts, and that rules of criminal and civil law ultimately "arise from one source only—namely, sheer necessity for order, security and self-preservation in society, which are totally unconnected in their inception with any moral notions whatever, and that the maintenance over a long period of time of these rules gives rise in due season to the *Rechtsgefühl* which we call the sense of right and duty, the perception of just and unjust." Dr. Allen's conclusion is that it is impossible with Duguit to eliminate subjective right from law, and that it is *a fortiori* impossible to eliminate both subjective right and duty, with Lundstedt, but that "it does not follow that all parts of the law must comprise the two compounded elements of right and duty." Refusing to take sides in the notable controversy as to whether "power" or "interest" is the basis of legal right, he combines the two ideas and defines a legal right as "the legally guaranteed power to realize an interest"—which would probably satisfy neither side. Austin and his theories have so long been the cock-shy of critics that it is interesting to find Dr. Allen (and not only in this essay) throwing not bricks but bouquets in his direction. Austin's "generally discredited" account of "absolute duties" is approved, and any right of the State in regard to crimes is declared to be "moral or nothing." An examination of the distinction between "absolute duties" and what is known in the law of tort as "absolute liability" and of the relation between legal duties and moral duties, in particular those that are altruistic, concludes a stimulating essay which, with others in this collection, will make all who are interested in the study of jurisprudence in relation to English law hope that, although Dr. Allen no longer speaks from a professorial chair, his new duties will leave him time to pursue the researches which have produced this admirable book.

A. E. W. H.

THE LAW OF CORPORATIONS.[1]

ALTHOUGH the literature of legal personality is enormous and irrepressible, there exists no satisfactory synthesis in English of the principal theories which have clustered round the problem. Dr. Bagchi therefore essays a task which is both timely and arduous when in his first few introductory lectures he endeavours to set before us the gist of the competing doctrines. The doubt left in the mind of the reader is whether the task was possible within the limits which the author necessarily imposed upon himself. After a short but lucid account of the historical development of the status of corporations in Roman, German, French and English law, we plunge into the thick of the controversy (despite a somewhat inconsistent disclaimer, at a later stage, of any "intention of entering into the history of metaphysical discussions regarding the nature of corporate personality"). The combatants are numerous and fierce: fiction, reality, "subjectless rights," "representation," collective property, collective will, "dispersed collective will," to name the chief. Many of these abstractions are not easily compressed and contradistinguished, and we fear that as thus presented they will leave in the minds of many readers sensations of bewilderment and tantalization. It is a little difficult to discover the author's own point of view, but he appears to be what may be called a Moderate Realist. "The real-person theory which regards a corporation as a group person with a group will seem to explain most of the facts of corporation law. A corporation . . . is a person in the juridical significance of the term and it is a real person. *The reality, however, exists in the eye of the law.*" But does not a reality which exists only in the eye of the law take us back to the very starting-point of the controversy between "reality" and "artificiality"? At times Dr. Bagchi seems disposed to give his allegiance to Freund's "representation" theory, which, indeed, gives a more recognizable picture of the actual facts of the legal situation than most of the other theories which are discussed. The account of Freund's forceful thesis (pp. 88 ff.) is worthy of special attention, and brings a refreshing breath of reality to much which up to that point has been somewhat elusive in substance and phraseology.

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[1] *Principles of the Law of Corporations.* The Tagore Law Lectures for 1914. By S. C. Bagchi, LL.D., Principal of University Law College, Calcutta. (Calcutta: R. Cambray & Co.) Pp. xviii + 631.

However, the metaphysical aspects of group personality are not Dr. Bagchi's main concern, and the rest of his lectures deal soundly and thoroughly with the chief principles of the substantive law affecting corporations in their creation, powers and liabilities, and dissolution. The main lines follow (as they were bound to follow) such standard works as those of Kyd, Grant, Carr and Maitland, but Dr. Bagchi's treatment includes some valuable new elements, especially elements of comparative law. For example, there is an interesting *précis* of the comparative law of the principal European countries with regard to the dissolution of corporations; and although the author, deeming the time to be unripe, wisely refrains from attempting to advance any general theory of corporations for British India, much of his discussion has special and appropriate reference to Indian institutions. In this connexion, although Maitland has left little to be said about that "juristic abortion," the corporation sole, Dr. Bagchi is able to add some instructive observations on the curious position of the idol, the temple and the *Sebait* in Hindu law. History is not neglected where it is necessary to explain theory; thus the chapter on Trading Corporations contains a brief but clear biography of John Company, and the chapter on Universities tells its story well, adding, for the benefit of the audience which Dr. Bagchi is primarily addressing, a clear statement of the legal position of the Indian universities.

The author has faced with resolution and with good sense some of the more controverted aspects of his subject: in particular, his treatment of the vexed question of the liability of corporations for the torts of their agents is convincing and, we venture to think, in accordance with authority. At p. 389 he makes the interesting and, it is believed, well-founded suggestion that corporate liability for tort should be dissociated altogether from the doctrine of *ultra vires*, with which it has no logical connexion; and we could have wished that this view had been further developed, since it has up to the present time received insufficient attention. The most difficult practical question of all—the juristic character of unincorporated associations and "quasi-corporations," in particular trade unions—Dr. Bagchi is compelled to leave somewhat at large, since the relevant rules of law are still paradoxical and hesitating; but in his last chapter he places the issues fairly before the reader, leaving him at the beginning of "a new chapter" which "has been added to jurisprudence" by the *Taff Vale Case*; for with that decision, the author holds, the quasi-corporation has acquired "a sort of personality—quasi-personality, one might say." We doubt whether any real principles of personality can be extracted from decisions like the *Taff Vale Case* and the *Osborne Case*, and whether the matter is not, in its simplest analysis, merely one of the interpretation of statutory powers and liabilities.

On the whole, Dr. Bagchi may justly claim to have succeeded in his professed object—"to deal with the principles and not the details of corporation law" (though detail is judiciously employed in support of principle), and to show "how the principles have been modified through the agency of opinion reflecting the changing needs of society." It is regrettable that as the book went to press as long ago as 1914, and was then the victim of inevitable interruptions, a number of important English decisions since that date have not been incorporated. Should another edition be called for, these enforced omissions will doubtless be repaired; and in particular we hope that Dr. Bagchi will consider the interesting aspects of the corporation sole which emerge from the recent case of *In re Mason*,[1] and how, or whether, the curious and important case of *Daimler Co.* v. *Continental Tyre Co.*[2] is to be reconciled with English doctrines of corporate personality.

The difficulties of producing a learned book in India are very great, and the author deserves sympathy rather than reproach for a certain proportion of the typographical defects with which this volume abounds, more luxuriantly, we do not hesitate to say, than in any other book we have ever seen. But a considerable number of these blemishes can be attributed to nothing else than culpable inattention and lack of system. Misprints are so glaring and so persistent that the sense is sometimes undiscoverable: there is no attempt at uniformity of reference, and indeed the references are frequently wholly unintelligible. "*A. G.* v. *Green*, (1789) 2 Booce" is not an unfair specimen, or, to take another example at random from many, the well-known case of *Ashbury Railway Carriage Co.* v. *Riche* (1874) L.R. 7 H.L. 653 appears with singular versatility as " *Ashbury Ry. Carriage* v. *Riche, L.R.* 1 *H.L.* 653," " *Ashbury Railway Carriage Company* v. *Rectri L.R.* 7 *H.L.* 693," and " *Ashley Railway Cast Iron Co.* v. *Rich* (Halsbury, *Laws of England*, vol. xiii) "—(in which volume no such case is mentioned). Necessary apparatus such as List of Authorities, Table of Cases and Index can only be described as chaotic. We trust that the compositor is responsible for certain minor solecisms, such as *delegatus non potest delegetare*: but we fear that he is not to be charged with " Lessons of the Social Movement " as a translation of the " *Leçons sur le mouvement social* " of Hauriou (who invariably appears as Hanriou). We are reluctant to set mere matters of form against solid substance and the effort which it represents: but the form here is so imperfect and so ill-disciplined that it seriously bewrays and impairs the substance. No book, whatever the extenuations, should come before the public in such *déshabille.*

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[1] [1929] 1 Ch. 1.

[2] [1916] 2 A.C. 307.

C. K. A.

ADMINISTRATIVE LAW.

THIS imposing volume[1] of 1165 pages is a " source-book," a " case-book," on the admirable American model, devoted to the illustration of the problems of administrative law. As the editors say in their preface, " since we are dealing with law in the making, this collection draws upon all sources that help to make law,—cases, statutes, legislative debates, rules and regulations, legal writings, and lay comment." How widely the compilers have cast their net is shown by the fact that in addition to American material of all sorts, they have found a place for twenty-two pages of the Commons' debate on the " power to remove difficulties " clause in the Local Government Act of 1929, for a leading article in *The Times* of April 1928, on " Judges as Official Advisers," and for articles by the late Professor Dicey, Sir Josiah Stamp and Sir Maurice Gwyer upon modern administrative tendencies in England.

The subject of Administrative Law is one the growing importance of which is no less conspicuous in the United States than it is in England. Again to quote the preface: " Government regulation of banking, insurance, public utilities, industry, finance, immigration, the professions, health and morals, in short, the inevitable response of Government to the needs of modern society, is building up a body of enactments not written by legislatures, and of adjudications not made by courts, and only to a limited degree subject to their revision. These powers are lodged in a vast congeries of agencies. We are in the midst of a process, still largely unconscious and unscientific, of adjusting the play of these powers to the traditional system of Anglo-American law and courts. Systematic exploration of these problems is the concern of Administrative Law."

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[1] *Cases and Other Materials on Administrative Law.* Edited by Felix Frankfurter and J. Forrester Davidson. (Commerce Clearing House, Inc., Chicago.)

But wide as is the ground which England and America have in common in their approach to the problems of administrative law, they are, nevertheless, divided by a difference the outstanding importance of which is conspicuously illustrated by the contents of this volume. America is a land of written Constitutions, both Federal and State: and the consequence is that in the United States the primary question raised for lawyers by administrative legislation is the question whether it is constitutional, whereas in this country our main concern is, or should be, with the elucidation of the standards and principles of rational government to which it is desirable that our legislation, unhampered as it is by a written Constitution, should conform. Questions of constitutionality similar to those with which this book is so largely concerned may and do arise in Australia and Canada—and the editors have included some cases from these Dominions; whereas with us in this country a decision influenced by considerations of a constitutional character may—particularly if it is unfavourable to the Crown—be overruled the following year by Act of Parliament. This is doubtless one reason why, though a few such cases as the Arlidge case, *ex parte* O'Brien and *ex parte* Jaffé are included, decisions of the English courts occupy a less conspicuous place in this volume than is common in American case-books.

The book is divided into three parts, devoted respectively to "Separation of Powers," "Delegation of Powers" and "Judicial Control of Administrative Action." Of these the last, dealing as it does, in the spirit and in the language of the Common Law, with problems which must by intrinsic necessity arise from the co-existence of administrative and "ordinary" law, will perhaps be found of greatest interest to English readers.

It is perhaps scarcely necessary to say that this being a "case-book," primarily designed for use in American law-schools, the reports it contains are shorn of their headnotes.

M. S. A.

RUMANIAN CUSTOMARY LAW.

M. Jorga's collection of Rumanian documents[1] is a token of the new interest taken in Rumania in the customary law which prevailed in the country before the introduction of French Codes in the nineteenth century. The documents, it is true, date from a period comparatively recent, and would hardly merit the epithet "*anciens*" if judged by Western standards. Few are earlier than the seventeenth, and the majority belong to the eighteenth or early nineteenth century. But conditions in Rumania, even so late as the beginning of the last century, were mediæval rather than modern, and the documents bear witness to the existence of a social organization and modes of thought which had passed away in more Western lands. In an all too brief introduction, the editor outlines the character of the documents so as to exhibit their relation to one another, and the current modes of thought and administration. Its excellence makes one wish that it had been considerably enlarged. It is, perhaps, too much to ask that it might have included a brief account of the political conditions in Rumania during the period, useful as this would have been, but its value would have been increased had it comprised a general sketch of the successive changes in rural and urban social organization.

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[1] *Anciens Documents de droit roumain.* By N. Jorga. (Paris, Bucharest, 1930.)

However this may be, the introduction and the documents give us illuminating glimpses of Rumanian life in the seventeenth and eighteenth centuries. The five hundred and five documents contained in the collection are arranged in fifteen classes. Of these the first five, containing not quite half the collection, refer to Land Law and Personal Status. Of the remainder, contained in the second volume, perhaps the most interesting are those pertaining to Procedure, mainly to Delimitation of Land. Finance and Administration are represented by as many as 150 documents. Taxation was heavy and weighed mainly upon the poorest classes, though some amelioration of their condition was attempted by the Mavrogordato princes in the eighteenth century. Throughout the whole collection one finds ample evidence of the importance of the Church and of the privileges enjoyed by convents and ecclesiastics generally.

In dealing with a collection of documents covering so wide a field, it is impossible to do more than refer to a few of striking interest. The basis of rural organization was the communal village, the community being, as one would expect, founded upon a reality or a fiction of common descent. Many documents in this part of the collection show the existence in the Rumanian " family village " of rules and fictions familiar to students of similar social institutions in Europe and elsewhere. To these M. Jorga draws special attention in his introduction.

In the realm of Procedure, one notes with interest the use of the Wager of Law. In document 297, law is wagered to be sworn with two men that a debt has been paid. In document 262 the oath-helpers of Peter de Larga swear that Peter is not an hereditary serf, and so on. More frequent still are the inquests of six or twelve or twenty-four summoned to determine disputed boundaries. In document 275 the " good men of the village " are called together to decide a question of ownership and to declare on their souls the facts in issue. At another of these delimitations, the ancients of the village are sworn in church and proceed along the boundaries of the property in dispute, each with a turf on his head (document 272). From a note by the editor one gathers that this was a not uncommon ritual.

The maintenance of landmarks was indeed a constant care. A witness states (document 273) that when he was a child a delimitator seized him by the hair saying, " See that you remember the landmarks, my child." Similar methods of perpetuating testimony existed, as we know, in country districts of England. To secure respect for boundaries, the offices of the Church were also engaged. Gabriel, Archbishop of

Moldavia, at the request of the Fathers of the Convent of Golia, pronounces upon those who make inroads on the delimited conventual property the curse of God and His Mother and the twelve Apostles and the 318 Fathers of the Nicene Council. There are several examples of such anathemas and of protestations against their incidence. Document 285 speaks of the use of the anathema; those who dared to kiss it being regarded as free from its blasting influence and, therefore, properly admitted as co-proprietors of the property in dispute.

Enough has been said to show the interest attaching to the documents collected by M. Jorga, which should prove of great assistance to students engaged in the study of conditions in Eastern Europe in the seventeenth and eighteenth centuries.

F. M. G.

AMERICAN FAMILY LAWS.[1]

THIS is the first volume of a projected comparative survey of the family law of the various jurisdictions in the United States, including Alaska and Hawaii. It deals with the contract to marry and its breach, the marriage ceremony, the marriage relation, prohibited marriages and annulment suits. Divorce is to be treated in the second volume.

When it is realized that the common law and statutes of fifty-one jurisdictions have been examined and digested, the magnitude of the authors' task is apparent. The arrangement of the subject-matter is clear, and any required detail seems easy to find—cross-references and synoptic tables being freely given. In addition to a summary of common law and statutes on each topic, comment and criticism are added, and at the end of every section there is a most useful collection of the references to the subject-matter of the section to be found in text-books, case-books and official reports, as well as in articles and notes in law magazines.

The book is primarily intended for United States lawyers, practising and academic, but all students of comparative "familial" law should be grateful to the authors for their painstaking and elaborate work.

A. E. W. H.

PUBLIC INTERNATIONAL LAW.[2]

THE first volume of this series, which dealt with the decisions of the year 1925–6, was universally welcomed as supplying a very real need. No previous attempt had ever been made to undertake a general survey of the very important evidence of international law which is supplied by the practice of national tribunals. Anglo-American writers have always kept a fairly close watch upon the decisions of their own courts, and indeed they have sometimes been criticized by Continental publicists for exaggerating the value of judicial contributions to the law of nations. But the foreign sources, although no less valuable, have for the most part been allowed to run to waste, and the publication of these volumes should help to correct any apparent lack of balance in the English literature.

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[1] *American Family Laws.* Vol. I. Introductory Survey and Marriage, by Chester G. Vernier, assisted by Fred A. Weller. (London: Humphrey Milford, Oxford University Press.) Pp. xxi + 311. Price 27*s*.

[2] *Annual Digest of Public International Law Cases*, 1927–8. Edited by A. D. McNair and H. Lauterpacht. (London: Longmans, Green & Co., 1931.) Pp. lii + 592. Price 42*s*. net.

The undertaking of such a task has only been made possible by the assistance of a body of collaborators in different countries. Of the 389 digests printed in the present volume 217 are selected from the national tribunals of 35 different jurisdictions. The remaining 172 are international, the majority being drawn from the decisions of the Mixed Arbitral Tribunals and the Mexico-American Claims Commission. It should perhaps be explained that these figures represent more than the total number of decisions cited, since many of the cases are dissected and the different points of law decided are digested under separate headings.

The volume abounds in interesting material which will suggest many lines of inquiry for the philosophical student of international law. It will, for example, help us to determine to what extent national tribunals reflect the point of view of their respective governments upon disputed questions. Thus the reader will note with interest the reasoning of the only decision which is cited from Soviet Russia (p. 375). The case arose out of the murder of a vice-consul at Odessa, and the court held that the act of the accused must be regarded as " very dangerous from a social point of view. . . . The assassination and the robbing of the Italian vice-consul have provoked the indignation of the workers of Odessa in view of the fact that the person murdered and robbed was a representative of a friendly State, and also in view of the cruelty of the murder and of the premeditated robbery." For this reason one of the accused was sentenced to death, although ordinary murders in Russia are requited with a sentence of ten years' detention.

It is announced in the preface that the next two volumes of the series, which we may now hope to be permanent, will deal with cases decided in the years 1919–24. The only general criticism which suggests itself to the reviewer is prompted by a note at the foot of p. xlix, in which the learned editors say:

> As it is at present not intended to go back further than the beginning of the year 1919, and not to digest decisions of Prize Courts, save in so far as they raise questions of general international law, War and Neutrality are only dealt with in this classification in very general terms.

The distinction thus indicated is likely in practice to prove very difficult to observe, and the value of future volumes will be impaired if the sections dealing with war and neutrality are left less complete than those which deal with peace. The true relation between the law of war and the law of peace was laid down once for all by Grotius in the first paragraph of his great book.

H. A. S.

COLONIAL ADMIRALTY JURISDICTION.[1]

THIS volume forms one of a series of " Imperial Studies " sponsored by the Royal Empire Society and limited to authors under thirty years of age. Miss Crump's scholarly essay describes the system of vice-admiralty courts in the Empire, not from the point of view of legal history, but as an institution of government seen in the light of its historical and social setting. She enables us to see the reasons which prompted the establishment of the courts and the reasons for which they met with opposition.

It was not until the end of the seventeenth century that admiralty jurisdiction throughout the Empire was placed upon a regular footing. During this century it grew up in a number of colonies in a haphazard and irregular way. The reasons for its establishment were many and various. In the West Indies the courts were set up mainly to deal with questions of prize and piracy ; in other colonies the motive must be found in wreck cases or in the enforcement of the trade policy of England. The whole development was entirely opportunist and it is impossible to trace in it the conscious application of any consistent principle. But it is good for the legal theorist to be reminded from time to time that his law and procedure are the children of history.

H. A. S.

A GERMAN STATEMENT OF ENGLISH CIVIL LAW.[2]

THIS is a monument of that thorough and minute scholarship which we are accustomed to expect from German sources. The series of which it is the second volume is intended to give a complete account of the " private law sources " (*Rechtsquellen*) of the world. To an English lawyer, " law sources " probably means the books and other literary monuments from which our knowledge of law is derived. To the editors of this series, the expression evidently means much more. For the volume under review gives a minute and full account, not merely of the books and other documents to which a German reader must turn to know English Civil Law, but of the provisions of that law itself. Whilst not on the scale of Halsbury's *Laws of England*, its seven hundred closely printed pages give a working account of the substantive civil law of England on the subject of Property (moveable and immoveable), including conveyancing and registration of title, mortgages and pledges generally, Trusts and Succession on Death, leaving the law of Contracts and Torts, Family Law, Lunacy Law, the law concerning Corporations, Self-help and Procedure for a subsequent volume ; while a supplementary volume is to contain a reprint of the more important Acts of Parliament and leading cases.

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[1] *Colonial Admiralty Jurisdiction in the Seventeenth Century.* By Helen J. Crump. (London : Longmans, Green & Co, 1931.) Pp. xii + 200. Price 9s.

[2] *Die Zivilgesetze der Gegenwart : Band II, Das Zivilrecht Englands in Einzeldarstellungen. Erster Teil.* By various authors. (Bentheimer : Mannheim, Berlin, Leipzig, 1931.) Pp. xiii + 711. Price RM. 56.

This programme is ambitious; but, to judge by the substantial instalment under review, there is no reason to doubt that it will be successful. And, while its primary interest must be for German readers and other foreigners who desire to consult a trustworthy guide to English Civil Law, we cannot withhold our tribute of admiration for the admirable learning and method applied to the task. Moreover, in spite of the rigidly objective and non-critical presentation of the subject, it is inevitable that authors trained in a wholly different system of jurisprudence should occasionally reveal, quite unconsciously, a glimpse of the impression made upon their minds by certain aspects of English law which should be interesting to English readers.

The volume begins with a general outline of the sources (formal and material) of English law, by Professor Andreas Schwarz of Freiburg im Breisgau, which includes a "General Bibliography" and an "Alphabetical List of Reports and their Customary Abbreviations." Part of this contribution is easy work for a competent writer such as Professor Schwarz; but there are parts of it, such as the theory of judicial precedent and the relationship of Law and Equity since the passing of the Judicature Act of 1873, which must be extraordinarily difficult for a foreigner to understand. It is, therefore, a high tribute to the author to say that he is perfectly at home in the peculiarities and idiosyncrasies of a specially technical subject, and that, if he fails to explain with logical clearness the mysteries of the *ratio decidendi* and the choice between conflicting precedents, he is in like case with most, perhaps all, English lawyers. Only two omissions—and those of detail—struck the writer as he read Professor Schwarz's pages, *viz.* that the publication of the parties' names in the Reports (which strikes Dr. Schwarz as noteworthy) is not without exception (*e.g.* for nullity, lunacy, and blackmail cases), and, second, that an exception from the general rule that the law reports are unofficial is to be found in the Reports of Patent Cases. But these are small points.

The introductory section of the volume is followed by a section on "Internationales Privatrecht," by Dr. Siegfried Goldschmidt, of Berlin; and, despite his refusal to adopt the English expression "Private International Law," Dr. Goldschmidt apparently follows the English view that what is known as the "Conflict of Laws" is part of the national law of each State, to be framed as that State resolves. We should have been glad if Dr. Goldschmidt, instead of plunging at once into the mysteries of "Domicil" had made his position clear on this point, which must be of importance to his readers.

Later sections in the volume are concerned with (*a*) Personal Property (Drs. Schmitz and Schwartzkoppen), (*b*) Real Property (Dr. Hans Goldschmidt), (*c*) Conveyance and Registration (Drs. Hans Goldschmidt and Langenbach), (*d*) Leases (Dr. Langenbach), (*e*) Servitudes (Professor

Dölle), (*f*) Mortgages and Pledges, (*g*) Trusts (Dr. Kohlmann), and (*h*) Succession (Professor Pringsheim). Without attempting any complete criticism of these sections, we may say generally, that they show a remarkably accurate grasp of the peculiarly minute provisions of English law which begets confidence. Even in the highly technical subject of Servitudes, Professor Dölle steers clear of the traps which lie thick in the path of the student, distinguishing admirably between (*a*) true servitudes, (*b*) customary rights over land, and (*c*) so-called "natural rights." With regard to the last-named, however, Professor Dölle hardly brings out with sufficient clarity the practical test, that the person who denies them, not the person who asserts them, is under the *onus*, contrary to the general rule of evidence, of proving his claim. But he makes the excellent point that, contrary to what might have been expected, the claim of uninterrupted flow of light can only be put forward as a claim to an easement, not as a "natural right." He might have added, that it can only be claimed in respect of a building. Professor Dölle even grapples (p. 487) with the highly technical distinction between profits "appurtenant" and profits "appendant."

The editors and authors of this volume have conferred upon all students and practitioners in their native country the benefit of an admirable summary of English Civil Law, sufficiently detailed to be of practical utility, but not so overloaded with detail as to obscure its scientific clarity.

EDWARD JENKS.

TRADING CORPORATIONS.

CHANGES in economic conditions during the last decade have inspired a movement for the reform of the law of trading corporations throughout the world. In Germany the work of reform has been preceded by an exhaustive investigation of the position as it exists in other systems of law, and the results of this preliminary survey of the field of action, carried out by Dr. Hallstein under the ægis of the Institut für Ausländisches Privatrecht of Berlin, are now made available to lawyers of all nations.

This book [1] is beyond doubt a very valuable contribution to our knowledge of this important, but extremely intricate, question. It commences with two tabular statements; the first of which deals with the sources of the law of limited companies, whilst the second is devoted to its bibliography. The bibliography, in particular, is of great value to comparative lawyers, though it does not profess to catalogue the thousands of monographs on Company Law in all the various languages. That would be an almost impossible task, and Dr. Hallstein has, with great wisdom, refrained from any such undertaking.

After indicating the nature of the materials which he has employed, the learned author proceeds to analyse the nature of the different legislative reforms which have taken place since limited liability companies came into existence. The landmarks in the progress of the movement are dealt with, and attention is directed in the first place to the English Act of 1862, the French Law of 1867 and the German Law of 1870. The author then proceeds to analyse the nature of the changes which have taken place in the law since those dates. He deals with the various problems which have arisen and indicates the methods which have been employed for their solution. Thus it appears that the process of reform has proceeded on parallel, though not identical lines. In all countries it has been found necessary to protect the investing public, and this need is reflected in the detailed provisions which have as their aim the regulation of statements in prospectuses, of the keeping of accounts and the giving of adequate information to shareholders through the medium of balance-sheets. It is interesting to note that the protection of minorities of shareholders looms very large in Continental legislation, whilst it only occupies a secondary position in the English schemes of reform. Continental lawyers find it difficult to appreciate the reasons for this difference in policy, but it arises from the fact that English experience has shown that measures intended to protect minorities often have a boomerang effect, and tend to substitute for the abuse of the powers of a majority an even more troublesome phenomenon, which takes the form of the paralysing of the executive functions of the directorate owing to the contumacious and obstructive conduct of a tyrannical minority of the shareholders. Sentimentally, the protection of a minority makes a strong appeal to the legislator, but viewed dispassionately it is at the least doubtful whether measures with this end in view do not tend to produce a greater evil than that which they are intended to cure.

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[1] *Die Aktienrechte der Gegenwart.* By Dr. Walter Hallstein. (Berlin: Franz Vahlen, 1931.) Pp. 408.

Dr. Hallstein's method is to detail the various problems which have arisen and to describe the devices employed to deal with them in each of the different countries. That portion of the book which is concerned with the formation of limited companies is particularly instructive. Taken as a whole, it is an admirable illustration of the value of comparative methods of legal study when employed in aid of the law reformer. We could not wish for a better analysis of this very intricate and difficult question. Dr. Hallstein and the Institut für Ausländisches Privatrecht are entitled to the gratitude of comparative lawyers of all nations for this extremely valuable contribution to our knowledge of the law of trading companies.

H. C. G.

RUSSIAN CRIMINAL LAW.[1]

Not the least difficult aspect of life to investigate in the Union of Socialist Soviet Republics is its legal system, as the present writer found during a visit to that interesting country. It is, however, not impossible, but it is a task which requires for its effective fulfilment considerable study in advance as well, naturally, as a knowledge of the Russian language. Both of these advantages Mr. Judah Zelitch, LL.M., of the Philadelphia Bar, assures his readers that he possessed before he embarked upon his extensive, though by reason of the subject not too extensive, work upon Soviet administration of criminal law. The work was apparently started in 1927 at the University of Pennsylvania Law School, continued during a three months' visit to Russia in the summer of 1928, and completed in Pennsylvania in 1931, where the writer presented it as a thesis for his degree of Master of Laws. It is a conscientious and painstaking statement beginning with an outline of the Soviet governmental system; outlining the rise and development of courts and tribunals in 1917 after the overthrow of the Kerensky regime; the development of their particular system of criminal law; the systems of investigation, inquiry and advocacy which are stated to be "auxiliary organs" to the judicial system; the procedure at and prior to trial; the personnel of the judiciary and its qualifications; these are mere items in a comprehensive survey of an administration of criminal law different in its philosophy, conception and general characteristics from that found in other countries. Like other institutions in the Soviet Union, it suffers from the difficulties arising from having to begin *ab initio*. The author states that the law itself differs widely from, though it is founded upon, that in operation in the old days of the Tsars, but that it reflects an entirely different and proletarian philosophy. This is what one would expect, but the author has, somewhat unnecessarily, gone to considerable trouble to draw between the old and the new, between the intra-Soviet and extra-Soviet systems, contrasts which are obvious by his lucid though detailed exposition of that system itself from which he indicates the emergence of, *inter alia*, certain characteristics: (*a*) a highly centralized system of criminal courts consisting mainly of three branches, namely, the People's Court, the Provincial Court and a Supreme Court; (*b*) each of these courts has original jurisdiction for various grades of offences and consists of one permanent judge, with whom sit two people's co-judges or co-sitters who, while sitting for the limited period of their appointment, exercise the same rights and powers as the permanent judges; (*c*) the jury system, as known elsewhere, is abolished; (*d*) appeals, as distinguished from cassation, are abolished; (*e*) there is a highly centralized hierarchy called the procuracy or "guardian of the Revolutionary law" which attends not only to the work of prosecution but, armed with extensive powers, supervises the execution of the law of the land in courts as well as outside them; (*f*) the ultimate control of the entire judiciary is vested in the central body which makes and executes the law of the land.

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[1] *Soviet Administration of Criminal Law.* By Judah Zelitch, LL.M. (Philadelphia: University of Pennsylvania Press; and London: Humphrey Milford, 1931.) Pp. xix + 418. Price $5.

Apart from the author's analysis of the actual system of law, procedure and practice he expresses his opinions upon the personnel of the Soviet judiciary and its activities. These he bases to some extent on

Tables, included in the volume, showing the social status and education of the judges of the various courts and of the procurators and the inquisitors and also Tables showing length of service and party membership. The majority of judges in both the Provincial Courts and the People's Courts were drawn from the ranks of workers and peasants; but although the comparatively low educational level of these tribunals is not regarded as satisfactory by the Soviet leaders, who seek continually to raise the standard, it is not deprecated as a serious obstacle to the administration of justice where obvious common sense is more highly regarded than metaphysical niceties. The author, however, quotes a leading Soviet legal writer as saying " we do not care for diplomas, but our troubles lie in the fact that our higher schools have not given us many learned jurists," although it is not uncommon to find many judges among the students of the law.

The author has not examined the codes of all the sovereign republics which compose the Soviet Union. He selected the Russian Socialist Federative Soviet Republic as being the most significant and the largest, with a population of 110 millions out of 161 millions in the entire Union. He finds in it traces of the old Russian system which was in turn based on the French system. It is, however, new in its proletarian philosophy, and in its adaptation to the new political and social order in which it is designed to function.

HECTOR HUGHES.

COMPARATIVE STUDY OF MODERN LAW.[1]

STEADY progress is being made with this work. The volume now coming out contains some articles of particular importance, such as those on Commercial Law and on International Private Law. The work will be indispensable to students of foreign laws.

We have also to acknowledge :[2]

A Guide to Diplomatic Practice. By Sir Ernest Satow. 3rd ed. by H. Ritchie, C.M.G., O.B.E. (London: Longmans, Green & Co.) Pp. x + 519. Price 36*s.*

Politica Methodice Digesta of Johannes Althusius. Introduction by Carl Joachim Friedrich, Ph.D. (London: Humphrey Milford, Oxford University Press.) Pp. cxxxix + 435. Price 34*s.* 6*d.*

The Permanent Court of International Justice and the Question of American Adhesion. By Charles E. Martin. (London: Humphrey Milford, Oxford University Press.) Pp. 48. Price 2*s.* 6*d.*

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[1] *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes,* herausgegeben von Dr. Franz Schlegelberger. Vierter Band, Lieferungen 1–6. (Berlin: Vahlen, 1932.)

[2] Mention here does not preclude a later review.

Mr. Justice Brandeis. Ed. by Felix Frankfurter. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 232. Price 17*s.*

Some Presidential Interpretations of the Presidency. By Norman J. Small. (Baltimore: Johns Hopkins Press.) Pp. 208. Price 8*s.*

Our Wonderland of Bureaucracy. By James M. Beck. (London: Macmillan & Co., Ltd.) Pp. xv + 272. Price 15*s.*

British Year-book of International Law, 1932. (London: Humphrey Milford, Oxford University Press.) Pp. vi + 250. Price 16*s.*

Human Sterilization. By J. H. Landman. (New York: The Macmillan Co.) Pp. xviii + 341. Price $4.

International Law in National Courts. By Ruth D. Masters. (London: P. S. King & Co.) Pp. 245. Price 19*s.*

Speeches and Documents on the British Dominions. Ed. by A. Berriedale Keith. (London: Humphrey Milford, Oxford University Press.) Pp. xlvii + 501. Price 2*s.*

Compulsory Arbitration of International Disputes. By Helen May Cory. (London: Humphrey Milford, Oxford University Press.) Pp. xiii + 281. Price 22*s.*

The Legal and Ethical Aspects of Medical Quackery. By L. L. M. Minty. (London: William Heinemann, Ltd.) Pp. xviii + 262. Price 7*s.* 6*d.*

The Framework of International Society. By S. H. Bailey. (London: Longmans, Green & Co., Ltd.) Pp. v + 92. Price 2*s.*

The Provincial System of Government in New Zealand. By W. P. Morrell. (London: Longmans, Green & Co., Ltd.) Pp. x + 293. Price 10*s.* 6*d.*

Bentham's Theory of Fictions. By C. K. Ogden. (London: Kegan Paul, Trench, Trübner & Co., Ltd.) Pp. clii + 161. Price 12*s.* 6*d.*

Trade Combinations in U.S.A., France, Germany and Poland. Foreign Law Series, No. 2. (London: Sweet & Maxwell, Ltd.) Pp. 206. Price 9*s.* 6*d.*

Transactions of the Grotius Society. Vol. 17. (London: Sweet & Maxwell, Ltd.) Pp. xviii + 194. Price 10*s.*

English and Empire Digest. Supplement No. 7. (London: Butterworth & Co., Ltd.)

La Liquidation (" *Winding up* ") *des Sociétés en droit anglais.* By A. de Mello. (Paris: Recueil Sirey.) Pp. 515. Price Frs. 80.

La Développement Historique des " *Uses* " *jusqu'à l'Introduction du* " *Trust* " *en droit anglais.* By M. A. Badre. (Paris: Rousseau & Co.) Pp. 216. Price Frs. 35.

Les Conflits de Lois en Egypte. By Bion Smyrniades. (Paris: Recueil Sirey). Pp. 63. Price Frs. 8.

Les Législations antivénériennes dans le monde. (L'Union Internationale contre le péril vénérien). Pp. 637.

Die Fahrlässigkeit im nordamerikanischen Deliktsrecht. By Dr. Friedrich Kessler. (Berlin: Walter de Gruyter.) Pp. 187. Price RM. 10.

Das Problem der einstweiligen Verfügung in der deutschen Reichsstaatsgerichtsbarkeit. By Dr. Adolf Schüler. (Berlin: Carl Heymanns Verlag.) Pp. 92. Price R.M. 5.60.

Wechselrecht. By Richard Michaelis. (Berlin: Walter de Gruyter.) Pp. viii + 553. Price RM. 40.

Handbuch des polnischen Rechts für den Handelsverkehr mit Polen. By K. Freiherr von Unruh. (Berlin: Deutsch-Polnische Handelskammer. Pp. 368. Price RM. 9.

Die foederalistischen Staatsverfassungen Lateinamerikas. By Carl G. Cornelius. (Berlin: Franz Vahlen.) Pp. 88. Price RM. 4·40.

Die Grundlagen des deutschen internationalen Privatrechts. By Dr. George Melchior. (Berlin: Walter de Gruyter.) Pp. xxxi + 558.

Lehrbuch des Stafrechts. By Dr. Robert von Hippel. (Berlin: Julius Springer.) Pp. xl + 440. Price RM. 15·80.

Die Familiengemeinschaften der Angelsachsen. By Dr. Jacob Braude. (Leipzig: S. Hirzel.) Pp. vi + 106. Price RM. 4.

Das Privatrecht der Zukunft. By Dr. Ernst Swoboda. (Berlin-Grunewald: Dr. Walther Rothschild.) Pp. 64. Price M. 3.

The following periodicals are also received; American Bar Association Journal; American Political Science Review; Aperçu Statistique du Commerce Extérieur de la République Tchécoslovaque; Bolletino della Emigrazione; Bombay Law Journal; Bulletin de la Société italienne pour les Etudes de Droit industriel; Bulletin officiel du Congo Belge; Bulletin statistique de la République Tchécoslovaque; Calcutta Weekly Notes; Chinese Social and Political Science Review; L'Egypte Contemporaine; Gold Coast Review; Headway; Hindustan Review; International Labour Office Bulletin; International Review of Agricultural Economics; International Year Book of Agricultural Legislation; Journal of the Parliaments of the Empire; Juridical Review; La Giustizia Penale; La Procedura Penale Italiana; Law Quarterly Review; League of Nations Journal; Madras Law Journal; New York University Law Quarterly Review; Revista de Ciencia Juridicas y Sociales; Revista de derecho jurisprudentia; Revista de Identificacion y Ciencias penales; Revue Internationale de la Croix Rouge; Social Sciences Quarterly; Studi di Diritto Industriale; University of Illinois Studies in the Social Sciences.